88-1278

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED TELEVISION CABLE SERVICE, INC., - - - - - Petitioner,

versus

THE CITY OF FRANKFORT, KENTUCKY, ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY and COMMUNITY SERVICE, INC., - - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the City of Frankfort, Kentucky, and its two municipal affiliates who operate an exclusive cable television system in violation of the antitrust laws, entitled to state-action immunity when there exists no "clearly articulated and affirmatively expressed" state policy authorizing municipal ownership or regulation of cable television, but rather a state court declaration that for state law purposes a municipality may franchise cable television and, by inference, own a cable system?

2. May the City of Frankfort, Kentucky, which has never taken any action to own or operate a cable television system, or to act "pursuant to" the statute purportedly granting it immunity, transfer by inaction its immunity to a City related entity whose statutory powers alone are insufficient to confer immunity from the antitrust laws?

3. Does res judicata bar petitioner's Civil Rights Claims which accrued in 1982 because petitioner did not and could not have asserted such claims in a 1960 state court action, or because petitioner's 1982 claims were not asserted in a 1971 federal suit which arose out of a distinct set of facts unrelated to the 1982 claim?

LIST OF PARTIES

The named parties are the only parties to this litigation. Petitioner, Consolidated Television Cable Service, Inc., has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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CONSOLIDATED TELEVISION CABLE SERVICE, INC., - - - - - - *Petitioner,*

v.

THE CITY OF FRANKFORT, KENTUCKY ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY AND COMMUNITY SERVICE, INC., - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Consolidated Television Cable Service, Inc. ("Consolidated") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on September 21, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 857 F. 2d 354, and appears in Appendix A to this Petition. The memorandum opinion of the United States District Court for the Eastern District of Kentucky has not been reported. It is reprinted as Appendix B hereto.

JURISDICTION

The Opinion and Judgment of the Court of Appeals for the Sixth Circuit was entered on September 21, 1988. Petitioner timely filed a petition for rehearing on October 5, 1988. The United States Court of Appeals for the Sixth Circuit denied petitioners petition for rehearing on November 4, 1988. Appendix D. This Petition for Writ of Certiorari was filed within 90 days of that date. The Court's jurisdiction to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves whether Kentucky Constitution §163 and Kentucky Revised Statute 96.010 confer state-action immunity on respondents for violations of the Sherman Act, 15 U.S.C. §§1, 2, and whether petitioner's First Amendment and Due Process claims brought pursuant to the Civil Rights Act, 42 U.S.C. §1983, are barred by res judicata. These statutes are set forth in Appendix E.

STATEMENT OF THE CASE

Petitioner is a for-profit corporation which has provided cable television service to the residents of East Frankfort, Kentucky for the past thirty (30) years. Respondent, Community Service, Inc. ("Community") is a non-profit, City affiliated Corporation which was formed in 1952 by six residents of Frankfort, Kentucky at the request of respondent, Electric

and Water Plant Board of the City of Frankfort, Kentucky ("Plant Board"). Community provides cable television service to all residents of Frankfort, not just those persons residing in East Frankfort.

The Plant Board is a statutory agency of respondent, City of Frankfort, Kentucky ("City") and possesses only those powers granted by KRS 96.171-96-188 to provide electricity and water to persons residing in Frankfort, Kentucky. By contract, the Plant Board retains ownership of all fixed assets of Community. All non-fixed assets of Community, including all revenue generated by Community which is not expended to purchase fixed assets, are owned by Community. The Plant Board leases its fixed assets to Community for $1.00 per year. Successive leases between the Plant Board and Community have specifically provided that the Plant Board maintains "no control" over the operation of Community's cable system.

Neither the City, nor the Plant Board, provide financial assistance to Community. The City has never received any income from Community. The City has never approved the existence of Community or any of the lease agreements between Community and the Plant Board. Aside from the yearly rental of $1.00 and the charges for electricity generated by Community, the Plant Board has never received any income from Community. The Plant Board has ultimate control over the continued existence of Community as a provider of cable services and, since 1967, has held the con-

tractual right to appoint three of Community's six directors.

During the past thirty years, the competitive relationship between petitioner and Community has not been harmonious. Since the early 1970's, the Plant Board has allowed Community to use all of its utility poles, thus enabling Community to serve all areas of Frankfort. Petitioner, however, has been restricted by the Plant Board to serving only the residents of East Frankfort, placing petitioner at a severe competitive and economic disadvantage.

In 1982, petitioner requested permission from the Plant Board to utilize all Plant Board poles and to be allowed to offer its cable services throughout Frankfort in direct competition with Community. The Plant Board denied petitioner's request. Petitioner then filed this action, invoking the District Court's jurisdiction pursuant to 15 U.S.C. §§4, 15 and 28 U.S.C. §1337.

In its Complaint, petitioner alleged that respondents had conspired to monopolize and had monopolized the availability of cable television in violation of the Sherman Act, 15 U.S.C. §§1, 2. Petitioner further alleged that respondents had engaged in predatory pricing conduct designed to drive petitioner from the marketplace. By a Second Amended Complaint, petitioner alleged that respondents' conduct violated petitioner's Civil Rights, including his right to freedom of speech and due process. Petitioner's Second Amended Complaint invoked the District Court's juris-

diction under 28 U.S.C. §1343, as well as 42 U.S.C. §1983.

On April 28, 1987, the District Court granted respondent's Motion for Summary Judgment on all of petitioner's claims. The District Court dismissed petitioner's antitrust claims relying upon the state-action immunity defense and this Court's decisions in *Parker* v. *Brown,* 317 U.S. 341 (1943) and *Town of Hallie* v. *City of Eau Claire,* 471 U.S. 34 (1984). Petitioner's Civil Rights claims were held barred by collateral estoppel, "if not by res judicata." The District Court's entry of summary judgment was a final order from which petitioner appealed.

On September 21, 1988, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. While finding that respondents' conduct "obviously [had] an anticompetitive effect" on petitioner, the Court predicated respondents state-action immunity upon a State Court decision which construed §163 of Kentucky's Constitution to authorize municipalities to franchise cable television. *Consolidated Television Cable Service, Inc.* v. *City of Frankfort,* 857 F. 2d 354, 361 (6th Cir. 1988). Section 163 of Kentucky's Constitution was enacted in 1891. It is a general grant of authority enabling cities to franchise certain specified public utilities. Section 163, due to its passage prior to the existence of cable television, does not mention cable television as a subject to be franchised or regulated.

According to the Sixth Circuit, since cable television under state law could be franchised, a municipality could also own a cable television system pursuant to KRS 96.010. KRS Chapter 96 is entitled "UTILITIES IN CITIES." KRS 96.010 was enacted in 1935, prior to the existence of cable television. Like §163, KRS 96.010 does not mention cable television and does not purport to declare cable television a public utility which may be owned or regulated by a municipality. Based upon the Sixth Circuit's conclusion that a municipality could own a cable system, it inferred that the Kentucky General Assembly contemplated anticompetitive results flowing from municipal ownership. Thus, a "clearly articulated and affirmatively expressed" state policy existed to insulate respondents from antitrust liability.

KRS 96.010 grants certain powers to "Cities" to regulate electric, gas and water "public utilities." Even though the City has never exercised any power purportedly granted by KRS 96.010 to "own" or "operate" a cable television system, the Sixth Circuit held that the City was acting "pursuant to" a state policy authorizing the regulation of cable television. According to the Sixth Circuit, a municipality may transfer by its silence its claimed immunity to a separate statutory entity, the Plant Board, whose statutory powers alone could not clothe it with immunity. The City's failure to act "pursuant to" a specific legislative mandate, as required by decisions of this Court, was deemed by the Sixth Circuit simply a state law

matter unimportant in determining the existence of immunity.

The Sixth Circuit rejected the District Court's holding that collateral estoppel barred petitioner's Civil Rights claims. Instead, the Court relied solely upon res judicata in finding petitioner's Civil Rights claims which accrued in 1982 barred by two separate lawsuits filed in 1960 and 1971. The 1960 action involved a state law claim that respondents acted arbitrarily, capriciously and had discriminated against petitioner in refusing to allow him to utilize all Plant Board poles to provide cable service. No Civil Rights claim was asserted in that state court suit, nor could one have been because of the decision in *Monroe* v. *Pape,* 365 U.S. 167 (1961). Indeed, the Court of Appeals of Kentucky (now the Supreme Court of Kentucky) ultimately disposed of that case by declaring that it had no jurisdiction to grant the remedy sought by petitioner. The Sixth Circuit concluded that petitioner's failure to assert his 1982 cause of action as a part of his 1960 lawsuit was res judicata.

The 1971 federal court suit relied upon by the Sixth Circuit to impose the bar of res judicata involved a claim by petitioner that Community, whose operation had previously been restricted to West Frankfort, was violating certain constitutional guarantees of petitioner by overbuilding his cable system in East Frankfort. Petitioner's present suit involves his right to overbuild Community and service all of Frankfort. There was no basis in 1971 for petitioner to assert a First Amendment claim because petitioner was in fact

operating in East Frankfort. While cognizant of the different factual situation which gave rise to the 1971 suit, the Sixth Circuit considered the "history" of this action and the 1971 action to be identical, thus invoking res judicata.

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit Standard for Conferring State Action Immunity Is In Direct Conflict With Decisions of This Court Because: (1) It Allows a "Clearly Articulated and Affirmatively Expressed" State Policy to be Inferred Instead of Requiring an "Affirmative Addressing" of the Subject; (2) It Abandons the Federal Test of What Constitutes a Clearly Articulated and Affirmatively Expressed State Policy in Favor of a State Court Determination of What Is Lawful Under State Law; and (3) It Eliminates the Requirement That a Municipality Must Act "Pursuant to" the Designated State Policy.

This Court has repeatedly recognized that municipalities are exempt from the Sherman Act only when a "clearly articulated and affirmatively expressed" state policy exists authorizing a subject to be regulated. *Town of Hallie* v. *City of Eau Claire,* 471 U.S. 34 (1984). To fall within that regulatory authorization, a municipality must act "pursuant to" its delegated power. *City of Lafayette, Louisiana* v. *Louisiana Power & Light Company,* 435 U.S. 389, 414 (1978). The new Sixth Circuit test dispenses with the latter requirement altogether. It also replaces the federal determination of whether a clearly articulated and affirmatively expressed state policy exists with a state

standard as to what is lawful under state law. No longer is state action immunity a federal question. Immunity exists whenever a state court declares municipal conduct lawful under state law. Contrary to pronouncements of this Court, a state may now "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *324 Liquor Corporation* v. *Duffy*, 479 U.S. 335, 93 L. Ed. 2d 667, 677 (1987).

A. The Sixth Circuit Test Is Contrary to This Court's Decisions Which Require That Municipal Immunity From the Sherman Act Arises Only When a State Legislature Affirmatively Addresses the Subject to be Regulated and Establishes a Clearly Articulated and Affirmatively Expressed State Policy Authorizing Regulation.

When municipal Corporations engage in commercial activities, the same potential for abuse exists in that their economic decisions may undermine the competitive principles embodied in the antitrust laws which apply to private businesses. *City of Lafayette, Louisiana,* 435 U.S. 389 (1978). In order not to diminish these competitive principles, this Court has often acknowledged that there is a "heavy presumption against implicit exemptions" from the antitrust laws. *Jefferson County Pharmaceutical Association, Inc.* v. *Abbott Laboratories,* 460 U.S. 150, 157-158 (1983).

Municipalities remain subject to the proscriptions of the antitrust laws unless a state legislature has "clearly articulated and affirmatively expressed" a state policy authorizing the challenged conduct. *Town of Hallie,* at 38; *Community Communications Com-*

pany, Inc. v. *City of Boulder, Colorado,* 455 U.S. 40 (1982). While the anticompetitive results of a state imposed regulation may be inferred, the legislative determination to regulate a subject may not be inferred. *Community Communications Company, Inc.,* 455 U.S. 40 (1982). A clearly articulated and affirmatively expressed state policy "implies an affirmative addressing of the subject by the state." *Id.* 821.

The existence of a clearly articulated and affirmatively expressed state policy is not a question of state law, but rather one of federal law. *Town of Hallie,* at 44, n8; *City of Lafayette, Louisiana,* at 415, n45. As this Court stated in *Community Communications Company, Inc.*:

> ". . . But it is not for us to determine the correct view on this issue as a matter of state law. Parker affords an exemption from federal antitrust laws, based upon Congress' intentions respecting the scope of those laws. Thus the availability of the Parker exemption is and must be a matter of federal law." *Id.* 52, n15.

To permit state courts to be the final arbiter of a clearly articulated and affirmatively expressed state policy for antitrust purposes would create 50 divergent standards and permit a state's interest in insulating municipal conduct from the antitrust laws to override the congressional mandate of competition.

The statute upon which the Sixth Circuit predicated respondent's immunity, KRS 96.010, was enacted in 1935. KRS Chapter 96 is entitled "UTILITIES IN CITIES" and pertains to three types of utilities—

electric, gas and water. KRS 96.010 was passed before the existence of cable television and, accordingly, contains no mention of cable television. It states:

> "*Sale of public utility franchises by cities.*— (1) At least eighteen (18) months before the expiration of any franchise acquired under or prior to the present constitution, the legislative body of each city shall provide for the sale of a new franchise to the highest and best bidder on terms that are fair and reasonable to the city, to the purchaser of the franchise and to the patrons of the utility. The terms shall specify the quality of service to be rendered and, in cities of the first class, the price that shall be charged for the service.
>
> (2) If there is no public necessity for the kind of public utility in question and if the city desires to discontinue entirely the kind of service in question, or if, in the case of cities other than those of the first class, the city owns or desires to own and operate a municipal plant to render the required service, this section shall not apply."

KRS 96.010 does not affirmatively address the subject of cable television. On its face it does not evidence a "clearly articulated and affirmatively expressed" state policy authorizing municipalities to own or regulate cable television. This Court has never extended state-action immunity to a municipal actor when the specific subject to be regulated was not clearly articulated by a state legislature. See, *Community Communications Company, Inc.*, 455 U.S. 40 (1982); *City of Lafayette, Louisiana*, 435 U.S. 389 (1978); 6 Von Kalinowski, *Antitrust Laws and Trade Regulation,*

16-30. Nor did this Court sanction the extension of immunity to Detroit Edison, a state regulated utility, when the pertinent public service commission regulations did not specifically refer to the free distribution of light bulbs which was claimed to be a violation of the antitrust laws. *Cantor* v. *Detroit Edison Company,* 425 U.S. 579 (1976).

In *Town of Hallie,* this Court pointedly noted that the failure of a state statute to address the specific subject for which immunity was claimed undermined the existence of a clearly articulated and affirmatively expressed state policy. In distinguishing between the Colorado Home Rule Amendment in *Community Communications Company, Inc.* and the Wisconsin waste treatment statutes there at issue, this Court stated:

> ". . . The [Home Rule] Amendment simply did not address the regulation of cable television." *Town of Hallie,* at 32.

The Sixth Circuit acknowledged that KRS 96.010 does not "explicitly" refer to cable television. *Consolidated Television Cable Service, Inc.* v. *City of Frankfort,* 857 F. 2d 354, 361 (6th Cir. 1988). It then ignored this Court's mandate that state-action immunity for municipalities is derived solely from the command of the state legislature. *324 Liquor Corporation* v. *Duffy,* 479 U.S. 93 (1987); *Town of Hallie,* at 38. Instead, the Sixth Circuit improperly inferred that the City could, for antitrust purposes, own a cable system based upon a state court decision which inferred that §163 of Kentucky's Constitution authorized munici-

palities to franchise cable television.[1] *City of Owensboro* v. *Top Vision Cable Company of Kentucky,* 487 S.W. 283 (Ky. 1972).

In *City of Owensboro,* the Supreme Court of Kentucky construed §163 of Kentucky's Constitution, which was passed in 1891, to include cable television as a proper subject for franchising. Section 163 states:

> § 163. *Public utilities must obtain franchise to use streets.*—No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

Since, for state law purposes cable television may be franchised, the Sixth Circuit concluded that a cable system may also be owned by a municipality pursuant to KRS 96.010. Respondents were therefore entitled to immunity because state law permitted the franchising of cable television and, by inference, municipal ownership as well. Indeed, the Sixth Circuit noted that a plethora of commercial activities not mentioned

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[1]Section 164 of Kentucky's Constitution sets forth that a franchise must be awarded to the highest and best bidder, and may not be granted for a term exceeding 20 years.

in §163 and KRS 96.010 might be characterized as "public utilities" for state law purposes. *Consolidated Television Cable Service, Inc.* v. *City of Frankfort,* 857 F. 2d at 361. Under the Sixth Circuit's approach all such commercial activity, whether it existed or not at the time KRS 96.010 was adopted, may be owned and operated by a municipality free from antitrust attack.

By permitting the state court decision in *City of Owensboro* to supply the otherwise absent clearly articulated and affirmatively expressed state policy, the Sixth Circuit abdicated its federal role and eliminated the federal standards applicable to a finding of immunity. The issue was never what is lawful for state law purposes. It was whether KRS 96.010 met the "clearly articulated and affirmatively expressed" federal standard established by decisions of this Court. *Town of Hallie,* at 44, n8; *City of Lafayette, Louisiana,* at 415, n45.

This Court has held that a municipality does not obtain immunity simply because its anticompetitive conduct "is lawful under state law." *324 Liquor Corporation,* 479 U.S. 335, 93 L.Ed. 2d 667, 677 (1987). Within the Sixth Circuit, every municipality is now entitled to immunity so long as a state court construes a state law to authorize the challenged conduct. In Kentucky, any activity which can be pigeon holed into the category of a "public utility" entitles a municipality to violate the Sherman Act. There is no longer a need for an "affirmative addressing" of the subject by the state legislature. *Community Communications Company Inc.* at 55. A clearly articulated and affir-

matively expressed state policy, as well as its anticompetitive results, may now be inferred based upon a state court determination as to what is lawful under state law. The Sixth Circuit opinion has seriously undermined the safeguards which this Court erected to prevent implied exemptions from antitrust laws for municipalities.

B. The Sixth Circuit Test for Immunity Is in Direct Conflict With Decisions of This Court Because Municipalities May Ignore the Mandatory Requirements of the Statute Conferring Immunity and by Inaction Transfer Their Immunity to Other Governmental Related Entities.

An essential element of state action immunity is that a municipality act "pursuant to" the declared state policy authorizing regulation. *Southern Motor Carriers Rate Conference, Inc.* v. *United States,* 471 U.S. 48 (1985); *City of Lafayette, Louisiana,* 435 U.S. 389, 414 (1978). Only by requiring that a municipality act "pursuant to" its delegated authority can it be assured that the contemplated state policy, rather than the City's parochial interest, is being served. The Sixth Circuit's Opinion eliminates that protection to all who compete with municipalities in providing commercial services. It relegates the requirement of acting "pursuant to" a state policy to an issue "better left to the determination of state courts." *Consolidated Television Cable Service, Inc.,* at 362.

The City has never acted to "own" or to "operate" a cable television system. The City has never approved the Plant Board ownership of Community's fixed assets or the lease arrangement between the Plant Board

and Community. The City has never taken any action at all with regard to cable television in Frankfort. KRS 96.010 authorizes only a "city" to "own" or "operate" a public utility. Nevertheless, the Sixth Circuit test affords immunity to the City, who has never attempted to follow the mandate of KRS 96.010, as well as to the Plant Board and Community.

Within the Sixth Circuit, any municipal related actor is free to engage in antitrust violations with impunity even though the municipality itself does not desire to invoke its statutorily created immunity or delegate it to a municipal related actor. It is no longer a necessary ingredient of immunity that the municipality follow the state mandate, or even that the municipal related actor do so. The existence of a state statute alone, which is silent as to the specific subject being regulated, confers immunity on all regardless of whether the municipality takes any overt act to delegate its regulatory power. A city sanitation department may now own or operate a cable television system or any other "public utility" without municipal authorization or concern for any resulting anticompetitive conduct.

By relegating to state court's the duty to enforce the federal requirement that municipalities act "pursuant to" the established state policy, a federal safeguard established by this Court to protect competition from unlawful municipal action has been abrogated. If the Sixth Circuit rule of deferring to state courts is allowed to persist, municipalities may freely disregard

the state policy held indispensable by this Court to create immunity. The attendant consequences are that aggrieved competitors will have no antitrust remedy. Since exclusive jurisdiction over Sherman Act claims reside in federal court, an aggrieved competitor such as petitioner will be deprived of any resort to what this Court has declared to be the "Magna Carta of free enterprise." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

The Sixth Circuit's reliance on principals of federalism to justify delegating to state court's the obligation to see that municipalities act "pursuant to" the established state policy ignores the uniform national policy embodied in the antitrust laws. *City of Lafayette, Louisiana,* at 408. As this Court stated in *City of Lafayette:*

> Petitioners argue that their exclusion must be inferred because it would be anomalous to subject municipalities to the criminal and civil liabilities imposed upon violations of the antitrust laws. The short answer is that it has not been regarded as anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose such sanctions upon "persons". *Id.* 400.

That a municipality's conduct must reflect the state policy which affords immunity is as substantive a requirement of the antitrust laws as the need for a "clearly articulated and affirmatively expressed" state policy. Without requiring municipalities to follow the state policy creating immunity, municipalities may

place their self interest over that of others with whom they are engaged in competition, particularly when the enterprise is a non-traditional governmental activity such as cable television.

II.

The Sixth Circuit Has Created a New Test for Res Judicata Which Is in Direct Conflict With Decisions of This Court in That it Bars Petitioner's Civil Rights Claims in 1982 Because Petitioner: (1) Did Not Assert a Civil Rights Claim in a 1960 State Court Action; and (2) Did Not Assert Such Claims in a 1971 Federal Court Action Even Though the 1971 Claim Was Based Upon a Different Cause of Action.

The Sixth Circuit test for res judicata is in direct conflict with this Court's decisions in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation,* 392 U.S. 481 (1968), *Zenith Radio Corporation* v. *Hazeltine Research, Inc.,* 401 U.S. 321 (1971), and *Lawlor* v. *National Screen Service Corporation,* 349 U.S. 322 (1955). Res Judicata now bars a claim based upon a repeated course of unlawful conduct for which no claim was or could have been previously asserted. It bars a Civil Rights claim based upon a state law violation which the state court lacked power to rectify. It also bars a 1982 cause of action based upon a 1971 suit whose factual basis was Community's overbuilding petitioner's cable system, *not petitioner's request to overbuild Community's cable system.* Repeated instances of municipal conduct, not barred by a statute of limitation, are no longer remediable according to the Sixth Circuit.

A. Contrary to the Decision of the Sixth Circuit, This Court Has Held That Repeated Instances of Conduct Give Rise to New Claims Which Are Not Barred by Res Judicata.

In *Lawlor* v. *National Screen Service Corporation,* 349 U.S. 322 (1955), this Court held that principles of res judicata do not bar future acts of misconduct.

> ". . . The conduct presently complained of was all subsequent to the 1943 judgment. In addition, there are new antitrust violations alleged here — deliberately slow deliveries and tie-in sales, among others—not present in the former action. While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Id.* 328.

In order for res judicata to bar an action there must exist an identity of issues, parties and a decision on the merits. *Newman* v. *Newman,* 451 S.W. 2d 417 (Ky., 1970); *Lawlor,* at 326. Where a claim of res judicata is based upon a previous state court judgment a federal court is bound by the forum state's principles of preclusion. *Marrese* v. *American Academy of Orthopedic Surgeons,* 470 U.S. 373 (1985). If the Court in the previous action did not possess the jurisdictional power to grant the requested relief or the party sought to be barred was unable to rely on a particular theory, res judicata does not bar a subsequent action. Restatement (Second) of Judgments §26(1)(c) (1982).

In 1960, petitioner filed a civil action in state court against respondents. That complaint alleged that re-

spondents' refusal to allow him to utilize the Plant Board's poles was "arbitrary, capricious, dictational and discriminatory." Petitioner's allegations were based upon pre-1960 conduct of respondents. In a Memorandum Opinion the Circuit Court dismissed petitioner's Complaint for failing to state a claim. The Court of Appeals of Kentucky affirmed, stating:

> ". . . Even if the Contract with Community is void or voidable, the Board is under no duty to lease its poles to anyone. This Court has no power to compel it to allow anyone, even appellant, to use the poles. Since the question here is whether appellant can compel the Board to allow it to use the poles, there is no need to discuss the authority of the Board to contract with Community." *Consolidated Television Service, Inc.* v. *Leary,* 382 S.W. 2d 78, 81 (Ky., 1964); See Appendix C.

In 1982, petitioner filed a Second Amended Complaint in the instant action alleging that respondents had violated the Civil Rights Act, 42 U.S.C. §1983, by depriving petitioner of rights guaranteed by the "First, Fifth and Fourteenth Amendments to the United States Constitution." Petitioner's Civil Rights claims were grounded on respondent's denial of access to a means to distribute protected speech to residents of Frankfort and respondent's failure to establish any standards or procedures whereby Community was entitled to utilize all of the Plant Board poles to the exclusion of all others. Those claims accrued in *1982*

when respondents denied petitioner's request to serve all of Frankfort.

The Sixth Circuit concluded that petitioner's Civil Rights claims were barred because they had not been raised in the 1960 state court action and the 1971 federal action. The Sixth Circuit did not apply the bar of collateral estoppel because the 1960 and 1971 cases did not involve the issues in this case. The Sixth Circuit's decision eviscerates res judicata. In its place it erects a wall which bars redress for subsequent unlawful acts which the court in the 1960 state suit was not required to adjudicate and which the Court was powerless to rectify. See *Consolidated Television Service, Inc.*, 382 S.W. 2d 78 (Ky. 1964). Indeed, in *Lawlor* and *Hanover Shoe, Inc.*, this Court held that a new cause of action accrues with each new unlawful act, thereby entitling an aggravated party to pursue a new claim.

The Sixth Circuit also held that its decision in *Harrington* v. *Vandalia-Butler Board of Education*, 649 F. 2d 434 (6th Cir. 1981), constituted an additional basis upon which res judicata barred petitioner's claim. *Harrington* held that a plaintiff could not assert a subsequent claim under 42 U.S.C. §1983 for the *same conduct* alleged in a previous Title VII action even though the decision *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) later allowed a Civil Rights action against a city.

The *Harrington* decision cannot bar petitioner's Civil Rights claims without undermining the decisions

of this Court. Petitioner's present claim is not based upon conduct which occurred in 1960 or 1971, but upon conduct in 1982. The Court which adjudicated petitioner's 1960 state law claims failed to possess the power to grant petitioner the relief requested in that case. If the Sixth Circuit's view of res judicata goes uncorrected, any successful litigant will be privileged to violate another's rights, whether those rights accrue under the Civil Rights Act, the antitrust laws or otherwise, simply by relying on a judgment that involved prior conduct and claims which were not and could not have been asserted.

B. The Sixth Circuit's Application of Res Judicata to Bar a 1982 Cause of Action Based Upon a 1971 Federal Suit Which Involved a Different Factual Claim Is Contrary to Decisions of This Court.

The Sixth Circuit also relied upon a 1971 federal action to bar petitioner's present Civil Rights claims. That 1971 suit was predicated upon an entirely distinct factual basis from petitioner's 1982 action and involved a 1971 claim, not a 1982 claim.

In 1971, petitioner instituted suit in United States District Court for the Eastern District Court of Kentucky against respondents. That suit arose out of Community extending its operations into East Frankfort which had previously been the exclusive territory of petitioner. The Complaint alleged impairment of contract in violation of Article I, Section 10, of the United States Constitution, as well as violations of Due Process and Equal Protection guarantees. The 1971 suit

did not arise out of petitioner's inability to compete in those areas of Frankfort exclusively reserved for Community. Nor were any First Amendment claims asserted because petitioner was operating in East Frankfort. In that case, the District Court dismissed petitioner's claims finding nothing that "would render the City's competition with the plaintiff a violation of any rights guaranteed by the United States Constitution." The Sixth Circuit affirmed. *Consolidated Television Cable Service, Inc.* v. *City of Frankfort,* 465 F. 2d 1190 (6th Cir. 1972); See, Appendix C.

In the present case, the Sixth Circuit construed its previous decision to bar petitioner's Civil Rights claims because the 1971 and 1982 cases involved the "same parties, the same evidence, and the same history." *Consolidated Television Cable Service, Inc.,* at 358. That ruling is in direct conflict with this Court's decision in *Lawlor, Zenith Radio Corporation,* and *Hanover Shoe, Inc.* In those cases, this Court held that each new act constitutes a new cause of action, even though a subsequent claim may involve the same history of dealings between the parties.

> "However, each separate cause of action that so accrues entitles a plaintiff to recover." *Zenith Radio Corporation,* at 338-339.
>
> * * *
>
> "We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. . . . Rather, we are dealing with conduct which constituted a continuing

> violation of the Sherman Act and which inflicted continuing harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955." *Hanover Shoe, Inc.,* at 502, n.17.

While *Lawlor, Zenith Radio Corporation,* and *Hanover Shoe, Inc.,* all involved antitrust violations, the principles of res judicata espoused by this Court are equally applicable to Civil Rights claims. It is not simply that a legal right has been violated in the past which determines the applicability of res judicata, it is the underlying facts, claim sued upon and the date upon which the claim accrued. "That both suits involve 'essentially the same course of wrongful conduct' is not decisive." *Lawlor,* at 327. Petitioner's present claim accrued in 1982 when respondents refused to allow him to service all of Frankfort. It was not based upon respondent's overbuilding of petitioner's cable system in 1971. Indeed, the District Court refused to find any of petitioner's claims barred by the statute of limitations applicable to petitioner's 1960 and 1971 claims.

The Sixth Circuit's rule of res judicata would eliminate claims predicated upon a continuing conspiracy or repeated instances of Civil Rights violations. Decisions of this Court are irreconcilable with the test now employed by the Sixth Circuit.

CONCLUSION

For the reasons set forth herein, this petition for Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph E. Stopher, a member of the Bar of this Court, hereby certify that on this 27th day of January, 1989, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Mr. Sheryl G. Snyder and Ms. Virginia H. Shell, WYATT, TARRANT & COMBS, 2800 Citizens Plaza, Louisville, Kentucky 40202; Mr. Allen Prewitt, PREWITT & PREWITT, 311 Wilkinson Street, Frankfort, Kentucky 40602; Mr. Charles L. Hobson, 222 West Main Street, Frankfort, Kentucky 40601, counsel for all respondents herein. I further certify that all parties required to be served have been served.

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APPENDIX

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
SEE, SIXTH CIRCUIT RULE 24

No. 87-5539

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CONSOLIDATED TELEVISION CABLE SERVICE, INC., - - - - - *Plaintiff-Appellant,*

v.

THE CITY OF FRANKFORT, KENTUCKY;
ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY; AND
COMMUNITY SERVICE, INC., - - *Defendants-Appellees.*

On Appeal from the United States District Court for the Eastern District of Kentucky

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Decided and Filed September 21, 1988

Before: KRUPANSKY and WELLFORD, Circuit Judges; and GILMORE, District Judge.*

GILMORE, District Judge, delivered the opinion of the court, in which KRUPANSKY, Circuit Judge, joined.

WELLFORD, Circuit Judge, (pp. 19-20) delivered a separate concurring opinion.

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*The Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

GILMORE, District Judge. In this action, plaintiff Consolidated Television Cable Service, Inc. (Consolidated), a private for-profit corporation engaged in the business of providing cable television (CATV) service for the City of Frankfort, Kentucky, alleges that defendants, The City of Frankfort (City), Electric and Water Plant Board of the City of Frankfort, Kentucky, (Board), and Community Service, Inc. (Community), have violated the Federal Anti-Trust Laws and 42 U.S.C. § 1983. The antitrust claim is essentially that defendants have unlawfully conspired to prevent free competition between Consolidated and Community, and have conspired to and have created an unlawful monopoly for the provision of CATV services. The § 1983 claim alleges numerous civil rights violations, including denial of due process and infringement of First Amendment Rights.

Community is a nonprofit, nonstock corporation that also provides CATV service in Frankfort. In fact, since the early 1950's, Consolidated, or its predecessors, and Community have both serviced Frankfort. Since its inception, however, Community has had a special relationship with the City and the Board. Consolidated has long desired to be placed on an equal footing with Community.

This is actually the seventh lawsuit brought by Consolidated since 1960 in connection with the provision of CATV services in Frankfort, and the second time the dispute has been before this Court.[1]

The district court granted summary judgment for defendants, dismissing the action, and holding that: 1) Consolidated's claim under 42 U.S.C. § 1983 is *res judicata;* 2) prior litigation estops Consolidated from arguing that Community is not an agency of the City and the Board,

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[1]*See Consolidated Television Cable Service, Inc.* v. *City of Frankfort,* 465 F. 2d 1190, 1193 (6th Cir. 1972).

and the record reveals that Community is a *de facto* agency; and 3) defendants are immune from the antitrust claims under the state action exemption of *Parker* v. *Brown*, 317 U.S. 341 (1943).

I

The district court summarized the pertinent facts as follows:

> When television became popular in the late 1940's, Frankfort, due to its topography and geography, was at a disadvantage in obtaining adequate reception of television broadcasts. In an effort to remedy Frankfort's inability to receive broadcasts on home antennae, the City and the Board consulted with Radio Corporation of America (RCA). RCA perfected a method by which multiple signals could be received through a single high antenna and distributed to homes by means of a coaxial cable. This Board created a non-profit, non-stock corporation, known as Community Service, Inc., to operate the new system that RCA had invented and which was owned by the City.
>
> The Board and Community entered into a contract in August of 1952. This contract was to run for one year and permitted Community's use of the Board's existing equipment as well as any extensions the Board might need to build in order to supply television service. No consideration was given but the contract provided for Community to reimburse the Board for any costs expended in construction. The title to all units constructed was vested in the Board.
>
> In September of 1955 a new contract was entered into between the Board and Community. This contract was to run for 10 years and permitted Community to operate the CATV system in the City. The entire tele-

vision system was leased to the corporation. The contract further provided that Community was to remain a non-profit corporation with all sums realized going to charity. The consideration for rental of the system was to be $1.00 per year.

By 1958 almost all the valley section of Frankfort was being served, except two fairly large areas in east and north Frankfort. Community had not extended this system to these areas for financial reasons. In 1958 plaintiff requested and in 1959 was granted a contract by the Board. This contract permitted Consolidated to construct a coaxial cable system for the unserviced areas of the City. It also permitted plaintiff to use city-owned utility poles in those areas.

By 1960 Consolidated had expanded as far as it could under its contract with the Board. It requested permission to extend its cable system into the same areas then being served by Community. The Board denied Consolidated's request to expand its pole attachments. As a consequence, plaintiff brought the first of the lawsuits which preceeded the present suit.

The contracts between plaintiff and defendant Board, and Community and Board, expired in 1965. Both parties were permitted to operate their cable systems in Frankfort without a contract for about 18 months. In 1967 Community was given a new contract but Consolidated was not. Community's new contract was for a period of five and one-half years and allowed Community to use all poles owned by the local telephone company and the plant board for $1.00 per year. One provision of this contract required Community to allow the Board chairman to nominate three members to Community's board of directors. In 1978, the defendant Board and Community entered into another con-

tract which was to extend for 10 years the prior supplemental contract of March 1971.

In 1976, Consolidated again requested permission to expand its cable system. This time defendants refused to permit them to do so allegedly because plaintiff was suing defendants.

In 1982 Consolidated again requested permission to expand its pole attachments throughout the City of Frankfort. The defendants, City, Community, and Plant Board, again denied Consolidated's request. That denial led to the present suit.

II

With reference to the § 1983 claim, the district court held that it was barred by collateral estoppel, if not by *res judicata*. We affirm on grounds of *res judicata* rather than on grounds of collateral estoppel.

Consolidated has had only one contract with the Board, which lasted from 1959 to 1965, and which was never renewed or extended. That contract gave Consolidated the right to use poles owned by the Board to erect its CATV system to service only that portion of the City known as East Frankfort. In 1960, Consolidated wanted to expand farther, but its request for a contract to allow it to use poles in other areas of the City that were being serviced by Community was turned down. Consolidated then filed suit in state court alleging that, by allowing Community to use all of the Board's poles in the City and denying the same right to Consolidated, the Board had acted in an arbitrary, capricious, and discriminatory manner. Eventually, the Court of Appeals of Kentucky[2] affirmed the dis-

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[2]At that time, the Court of Appeals was then the highest appellate court in Kentucky.

missal of the action by the trial court, stating in pertinent part:

> Under the facts recited, and the principles of law applicable thereto, we believe the Board's refusal to grant appellant the right to use its poles did not necessarily result in unconstitutional discrimination . . .

Consolidated Television Service, Inc. v. *Leary,* 382 S.W. 2d 78, 81 (Ky. 1964).

In 1971, an agreement was entered into by Community and the Board to allow Community to extend its operations into East Frankfort, where previously Consolidated had operated exclusively, and to use poles owned by the Board. This precipitated a suit in the United States District Court for the Eastern District of Kentucky by Consolidated against the Board, the City, and Community, alleging unconstitutional impairment of contract, and violation of the due process and equal protection clauses of the Fourteenth Amendment. The action sought injunctive relief.

The district court dismissed the complaint, and this Court affirmed, stating: "[W]e agree with Judge Moynahan that the City's operation of its own CATV system does not violate any rights of Consolidated protected by the Constitution of the United States." *Consolidated Television Cable Service, Inc.* v. *City of Frankfort,* 465 F. 2d 1190, 1193 (6th Cir. 1972).

In the present action, Consolidated alleges that defendants denied Consolidated access to telephone poles so as to prevent it from offering cable television service to Frankfort, in violation of 42 U.S.C. § 1983, and the First, Fifth, and Fourteenth Amendments to the United States Constitution. The suit was filed in 1982, prompted by defendants' refusal to grant Consolidated's request for permission to expand its pole attachments throughout the City. According

to Consolidated, a similar request had been rejected in the late 1970's on the grounds that defendants would not grant a contract to Consolidated in light of the ongoing litigation between the parties. Thus, Consolidated repeated its request in 1982, once all pending litigation was resolved.

The preclusive effect of a prior state court judgment is determined by looking to the law of that state. *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982). Similarly, the scope of a prior federal court judgment is governed by federal law. *Cemer* v. *Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978). However, Kentucky courts and this Circuit define the doctrine of *res judicata*, also known as claim preclusion, essentially the same. Kentucky courts will find an action *res judicata* under the following circumstances:

> First, there must be identity of parties. Second, there must be identity of the two causes of action. Third, the action must be decided upon its merits. In short, the rule of *res adjudicata* does not act as a bar if there are different issues or the questions of law presented are different. *Likewise, it has long been recognized that a party may not split his cause of action, therefore, if a cause of action should have been presented and the party failed to do so and the matter should again arise in another action, it will be held that the first action was res adjudicata as to all causes that should have properly been presented . . .*

Newman v. *Newman*, 451 S.W. 2d 417, 419 (Ky. 1970). (emphasis added). Or, as this Court stated in *Vinson* v. *Campbell County Fiscal Court*, 820 F. 2d 194, 197 (6th Cir. 1987), under *res judicata*, "a final judgment on the merits bars further claims by the parties on the same cause of action . . ." including "issues which could have been but were not litigated in the [prior] proceeding . . ,"

Here, Consolidated for the first time raises a First Amendment claim, and again raises its Fifth and Fourteenth Amendment claims, albeit in a slightly different form. These claims could have been raised in the prior litigation in the two suits mentioned above in Federal and state court. Consolidated claims that defendants' treatment of it, as compared to the treatment accorded to Community, violates its constitutional and civil rights. Consolidated's suit in state court in 1960 raised exactly the same issues as raised in this lawsuit, and even though the 1971 federal court action was prompted by defendants' encroachment on Consolidated's previously exclusive territory, the central issues were the same: Did defendants' methods of making CATV service available to Frankfort violate Consolidated's civil and constitutional rights? Both actions involve the same parties, the same evidence, and the same history as the present action. Therefore, Consolidated's § 1983 claim is *res judicata* because it sets forth claims that were or could have been presented in prior litigation.

Consolidated's claim that it could not have brought its § 1983 claims in the prior litigation because it was not until the Supreme Court's *Monell*[3] decision in 1978 that municipalities were amenable to suit under § 1983 is unavailing. This Court addressed a similar argument in *Harrington* v. *Vandalia-Butler Board of Education,* 649 F. 2d 434 (6th Cir. 1981). In *Harrington,* this Court held that a prior Title VII employment discrimination action against a municipality was *res judicata* to subsequent action under 42 U.S.C. § 1983, notwithstanding that the § 1983 claim had been considered not viable against municipalities until the Supreme Court's *Monell* decision, which was rendered after the filing of the first action. Just as the Court observed in

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[3]*Monell* v. *Department of Social Services,* 436 U.S. 658 (1978).

Harrington, "Section 1983 was not 'unavailable' to appellant" in 1960 and 1971; Consolidated "was free to challenge the validity of *Monroe* v. *Pape* to the extent that it exempted municipalities from the ambit of § 1983 . . ." *Id.* at 437.

The circumstances between the parties have not really changed over the past 35 years. Consolidated keeps asking for a contract to use the Board's poles and, except for the 1959-1965 contract, the Board has consistently rebuffed Consolidated. Two courts have looked at this matter, and have concluded there is no denial of constitutional rights. At some point, litigation must come to an end. Therefore, Judge Bertlesman's ruling that Consolidated's § 1983 action is *res judicata* is affirmed.

III

The district court next held that Community was a municipal agent, as opposed to a purely private actor, on three grounds: 1) collateral estoppel; 2) judicial estoppel based on the fact that Consolidated had actually argued in previous litigation that Community was an agent, and 3) that, as a matter of fact and law, Community is an agent, and cannot prove otherwise. This determination is critical to determining whether Community is entitled to state action immunity from the antitrust allegations. We agree with the district court that Community was a municipal agent, and not a purely private actor. We make this determination upon undisputed facts.

It is undisputed that the Board is a municipal corporation and that the Board, in the early 1950's, created Community. Since then, Community's form and method of operation has been dictated by the City through the Board. It is true that the Board leaves "day-to-day" operations in the hands of those who run Community. But it is also a fact that Community exists at the pleasure of the Board, and the Board appoints one-half of Community's board of

directors. In almost every lawsuit it has filed, Consolidated itself has admitted in its allegations that the contracts between the Board and Community recite that the Board "is the owner, and has ultimate control, of the television cable system." It is not for this Court to parse Kentucky state law to determine whether the Board and the City are permitted to provide for CATV service to citizens in Frankfort precisely in this manner. Kentucky law clearly authorizes municipal regulation of CATV services. Under the facts of this case, it is clear that the Board has ultimate control of Community, and that Community is a municipal agent and should be treated as such for purposes of the doctrine of state action immunity of the antitrust laws.[4]

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[4]There is also support for applying the doctrine of judicial estoppel, which holds that, "a party who has successfully and unequivocally asserted a position in a prior proceeding . . . is estopped from asserting an inconsistent position in a subsequent proceeding . . ." *Edwards* v. *Aetna Life Ins. Co.*, 690 F. 2d 595, 598 (6th Cir. 1982). "The requirement that the position be successfully asserted means that the party must have been successful in getting the first court to accept the position . . ." *Id.* at 599. But, "[a] party need not finally prevail on the merits in the first proceeding. Rather, judicial acceptance means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition." *Id.* at n.5.

In its 1971 federal court complaint, Consolidated affirmatively alleged: "Community Service, Incorporated . . . since March 25, 1967, has been uder the control of the Plant Board and now is an agency of that Plant Board . . ." (App. 356).

This Court took special note of that allegation in its 1972 opinion, observing, "It seems to be undisputed that the actions of Community referred to in this opinion, in substance and practical effect, are the acts of the municipal corporation, the City of Frankfort." 465 F. 2d 1190, n.2. The allegation was necessarily accepted by this Court before reaching the merits of Consolidated's claims of constitutional violation by Community, together with the City

(Footnote Continued on Next Page)

IV

The district court ruled that all three defendants are entitled to state action immunity from the antitrust allegations. We agree.

The state action immunity doctrine was established in 1943 in *Parker* v. *Brown,* 317 U.S. 341 (1943). There, the Court upheld, against an antitrust challenge, a California law establishing a cartel of private raisin producers. The Court recognized the anticompetitive nature of the state's program, but found it outside the reach of the federal antitrust laws because:

> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as

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(Footnote Continued From Preceding Page)

and the Board, just as it is necessary to allege state action for a Section 1983 action.

Furthermore, in *Norrell* v. *Electric Water Plant Board,* 557 S.W. 2d 900 (Ky. App. 1977), the state court affirmed judgment for these same defendants in an action alleging that the City and the Board lacked authority to own and operate a CATV system. The *Norrell* court concluded that plaintiffs were judicially estopped from asserting this claim in light of their allegation in federal court that "the City does have the power to run a CATV system itself as a part of its electrical plant facility, "and their contradictory, but often changing, allegations in state court. The *Norrell* court felt that plaintiffs were amending their allegations on this crucial issue to suit their current litigational aim and should no longer be permitted to "play fast and loose with the courts." This prior ruling of the state court that judicial estoppel precludes raising the issue of the legal status of Community as a municipal agent provides the basis for ruling, as did the district court, that Consolidated is collaterally estopped from raising that issue in this lawsuit.

> an act of government which the Sherman Act did not undertake to prohibit.

Id. at 352.

In *Town of Hallie* v. *City of Eau Claire,* 471 U.S. 34 (1985), the Court held that anticompetitive conduct by a municipality is protected by the state action exemption where the city's actions are authorized by state law even though the state does not compel or actively supervise the anticompetitive conduct, or expressly assert that the law is intended to have an anticompetitive effect. The municipality's actions need only be pursuant to a clearly articulated and affirmatively expressed state policy. The Court said:

> The determination that a municipality's activities constitute state action is not a purely formalistic inquiry; the State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful. On the other hand, in proving that a state policy to displace competition exists, the municipality need not "be able to point to a specific, detailed legislative authorization" in order to assert a successful *Parker* defense to an antitrust suit . . . .
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> . . . .
>
> It is therefore clear from our cases that before a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy.

471 U.S., at 38-39 (citations omitted).

In *Hallie,* the Court found a sufficiently clear articulation of state authority for the City of Eau Claire to displace competition with local regulation in the language of

the state's enabling legislation for local sewage systems. A group of unincorporated townships alleged that the City had violated the antitrust laws by monopolizing sewage treatment in the area, and by providing sewage treatment only to areas that were willing to be annexed by the city, and use its sewage collection services. However, the state legislation specifically allowed cities to refuse to provide sewer service to unincorporated areas. The *Hallie* court found the City immune under the *Parker* doctrine even though the statute did not expressly state that it authorized anticompetitive conduct since such conduct was a foreseable result of giving the city power to refuse to serve unannexed areas.

Additional clarification of the doctrine has come from this Court in *Riverview Investments, Inc.* v. *Ottawa Community Improvement Corp.*, 769 F. 2d 324 (6th Cir. 1985), *modified* 774 F. 2d 162 (1985). The Court noted that the Supreme Court in *Hallie, supra,* and *Southern Motor Carriers Rate Conference, Inc.* v. *United States,* 471 U.S. 48 (1985), had actually developed a two-prong test for state action immunity:

> The first prong requires that the anti-competitive behavior derive from a clearly articulated state policy; the second prong requires active supervision of the anti-competitive behavior, but only when the actor is a *private* party rather than a municipality . . . .

769 F. 2d, at 329 (emphasis in original). Of course, the second prong is not applicable in the instant case because we agree with the district court that, as a matter of law, all three defendants are municipal entities. *See* Section III, *supra.* In *Riverview Investments,* plaintiff challenged the denial of its application for industrial revenue bonds on antitrust grounds. This Court held that the statute granting cities authority to issue such bonds constituted clearly

articulated state policy to displace competition, and, therefore, satisfied the first prong of the test "because decisions increasing or restricting competition, though not explicitly stated or recognized in the Ohio statute, are a logical and necessary outcome of the authority to grant industrial revenue bonds for the purpose of protecting jobs." *Id.*

In contrast, the state action exemption was found inapplicable in *Community Communications Co., Inc.* v. *City of Boulder, Colorado,* 455 U.S. 40 (1982) where the Court held that the Colorado Constitution's Home Rule provision conferring general authority to govern local affairs on municipal governments did not constitute a sufficiently "clear articulation" of a state policy to authorize anticompetitive municipal conduct so as to immunize such conduct in connection with awarding of a cable TV franchise. The Court emphasized: [T]he requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive . . . ." *Id.* at 55 (emphasis in original).

In this case, we find there exists under Kentucky law a "clearly articulated and affirmatively expressed" state policy to allow municpal regulation of the provision of CATV service, and, foreseeably, to displace competition. Unlike the mere Home Rule provision in *Community Communications, supra,* Kentucky law is not neutral, and clearly contemplates the type of anticompetitve conduct that is alleged in this case.

To begin with, Section 163 of the Kentucky Constitution requires public utilities to obtain a franchise, stating that a municipal utility must obtain "consent of the proper legislative bodies or boards of such city or town," before it may "construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or

town. . . ." Section 164 of the state Constitution further authorizes municipalities to grant franchises. Pursuant to these constitutional provisions, the Kentucky legislature has enacted KRS 96.010, which further specifies the manner of granting public utility franchises, and provides in subsection (2) that "if . . . the city owns or desires to own and operate a municipal plant to render the required service, this section shall not apply."

Although these constitutional and statutory provisions do not explicitly refer to CATV services, the highest court of Kentucky has interpreted them to cover services other than "railway, gas, water, steam heating, telephone, or electric light," Sec. 163, *supra*, including CATV services. In *Ray* v. *City of Owensboro*, 415 S.W. 2d 77, 79 (Ky. 1967), the court held these provisions "should not be restricted to those utilities enumerated, but applies to all utilities and services which might today be proper subjects for control, when the original intent and purpose of the act is considered. . . ." Thus, in *Ray*, the court held the city had authority under the state constitution to prohibit operation of an ambulance service without first obtaining a franchise. And soon after *Ray*, the same court held that, pursuant to these provisions of the Kentucky constitution "the right to operate a community antenna television service [cable TV] in a city is a subject for franchise. . . ." *City of Owensboro* v. *Top Vision Cable Co.*, 487 S.W. 2d 283, 287 (Ky. 1972), *cert denied* 411 U.S. 948 (1973).

This Court has previously relied on the interpretation of state law by the courts of that state in concluding that a defendant is entitled to state action immunity from antitrust allegations. In *City of North Olmsted* v. *Greater Cleveland Regional Transit Authority*, 722 F. 2d 1284 (6th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984), this Court held that the alleged monopolization of municipal bus lines

by a regional transit authority was protected under the *Parker* doctrine, stating:

> Based on the authoritative interpretation of the Ohio Regional Transportation Act given by the Ohio courts, we conclude that the actions of GCRTA [the regional transit authority] alleged in North Olmsted's complaint were contemplated and authorized by state law and constituted state or state subdivision action in furtherance of "affirmatively expressed state policy."

Id. at 1288. Moreover, displacement of competition in the provision of CATV service—and many other services other than those specifically enumerated in the constitutional provisions—is a foreseeable result of granting the city power to franchise public utilities or own and operate a municipal plant. *See Hallie, supra; Riverview Investments, supra.*

We conclude that defendants' actions in providing CATV service for the residents of Frankfort primarily through Community, although obviously having an anti-competitive effect to the detriment of Consolidated and others, are pursuant to "clearly articulated and affirmatively expressed" Kentucky state law. Therefore, we affirm the district court's ruling that defendants are entitled to state action immunity from antitrust allegations under *Parker*.[5]

We reject Consolidated's argument that defendants are not entitled to state action immunity because they are not acting pursuant to state law in that they are not following the letter of the law by issuing a franchise.

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[5]For similar holdings, *see Hopkinsville Cable TV, Inc.* v. *Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982) (interpreting Kentucky law); *City Communications, Inc.* v. *City of Detroit*, 650 F. Supp. 1570 (E.D. Mich. 1987) (interpreting Michigan law.)

This argument is unavailing. First, under KRS 96.010 (2), *supra*, the Kentucky legislature has dispensed with the need to issue a franchise "if . . . the city owns or desires to own and operate a municipal plant to render the required service. . . ." Secondly, the argument overlooks the rationale for the state exemption doctrine. Instead of denying state action immunity on grounds that the state legislature did not contemplate wrongful conduct, the better view is that anticompetitive conduct is immune so long as it is "a reasonable and foreseeable exercise of delegated powers." *Hybud Equipment Corp.* v. *City of Akron, Ohio,* 742 F. 2d 949, 960 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

The heart of the *Parker* doctrine is federalism—a desire to allow states as separate sovereigns to proceed unfettered by federal laws restricting their actions when they act within their proper sphere. As the Supreme Court observed in *Hoover* v. *Ronwin*, 466 U.S. 558, 574 (1984), "The court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers. . . ."

The Ninth Circuit has twice rejected the argument that state action immunity should be denied because defendants' action represented a misapplication of state law. *Llewellyn* v. *Crothers*, 765 F. 2d 769 (9th Cir. 1985); *Boone* v. *Redevelopment Agency of City of San Jose*, 841 F. 2d 886 (9th Cir. 1988). The court said in *Llewellyn:* " 'Ordinary errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control.' A contrary rule would tempt aggrieved parties to forego available state corrective processes in the hopes of obtaining the treble damages remedy conferred by the Sherman Act . . ."

The foundation for immunity is federalism, and the sovereignty of state action must be respected without reference to the subjective motivations of persons implementing the state's policy. Any other analysis would unacceptably erode the state action doctrine, since plaintiff would only need to present a claim of bad faith to escape the doctrine. As one eminent commentator has observed:

> State laws intended to displace the antitrust laws may delegate to public agencies or officials the power to act, decide, or regulate in order to achieve anti-competitive results. Of course, state law "authorizes" only agency decisions that are substantively and procedurally correct. Errors of fact, law or judgment by the agency are not "authorized," and state tribunals will normally reverse erroneous acts or decisions. If the antitrust court demands unqualified "authority" in this sense, it will inevitably become the standard reviewer of governmental agencies, whenever it is alleged that the agency, though possessing the power to engage in the challenged conduct, has exercised its power erroneously.

Areeda, *Antitrust Immunity for "State Action" after Lafayette,* 95 Har. L. Rev. 435, 449-50 (1981).

As this Court has already indicated, whether the state authorizes provision of CATV service precisely as the arrangement among defendants contemplates is better left to the determination of state courts. *Consolidated Television Cable Services, Inc. City of Frankfort,* 465 F. 2d 1190 (6th Cir. 1972). Moreover, we conclude here that, under state constitutional and statutory provisions, defendants' manner of providing CATV services to the residents of Frankfort is reasonably foreseable. Therefore, defendants are entitled to state action immuity from the antitrust allegations.

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of all three defendants.

WELLFORD, Circuit Judge, concurring.

The prior decision of this court authored by Chief Judge Harry Phillips, held, in effect, that the City of Frankfort, through its agent, Community, was operating a CATV system in that city, and held:

> This suit was filed by Consolidated to challenge the *expansion of the City-owned CATV system,* contending that the acts of the City and its agencies impair obligations of contract and deny Consolidated due process of law as guaranteed by the Fourteenth Amendment.
>
> * * *
>
> The City and its agencies are shown to be doing nothing more than to use City-owned utility poles for the extension of the *CATV services provided by the City* in areas presently served by Consolidated. The record shows that it has been the policy of the City and its agencies to provide CATV service to an ever increasing number of areas in the City of Frankfort, beginning with those areas where, because of topography, the need for cable television was most urgent.

Consolidated Television Cable Service, Inc. City of Frankfort, Ky., et al., 465 F. 2d 1190, 1192 (6th Cir. 1972) (emphasis added).

The suit in that case by Consolidated did not take issue with the fact that, in effect, it was the City of Frankfort, through its agency, Community, that operated the CATV system competing with Consolidated. Constitutional challenges were raised in the earlier case to the actions of the City through extension of CATV services into the area previously served exclusively by Consolidated. I concur,

therefore, with the holding that principles of res adjudicata bar this action by Consolidated. (I admit some difficulty, however, with the holding in *Norrell* v. *Electric and Water Plant Board,* 557 S.W. 2d 900 (Ky. App. 1977) that plaintiffs were similarly barred from challenging the City's authority to operate a CATV system under Kentucky law.)

I also concur with Judge Gilmore's decision that the district court was not in error on this record that Community was, in fact, an agent of the City of Frankfort for purposes of considering the *Parker* v. *Brown,* 317 U.S. 341 (1943) state action immunity doctrine. I further agree that Kentucky law permits regulation of CATV service, and permits the municipality to subject CATV operations to a franchise arrangement. *City of Owensboro* v. *Top Vision Cable Co.,* 487 S.W. 2d 283 (Ky. 1972), *cert. denied,* 411 U.S. 948 (1973). I am not sure, however, that there is clearcut Kentucky law that deals with municipal supervision over, or ownership of, CATV operations, that is "clearly articulated and affirmatively expressed" within the meaning of *Parker.* There is authority from a United States district court in Kentucky that awarding an exclusive franchise to a CATV operator falls within the " 'state action' exemption . . . created in *Parker* v. *Brown.*" *Hopkinsville Cable TV* v. *Pennyroyal Cablevision, Inc.,* 562 F. Supp. 543, 545 (W.D. Ky. 1982).

The City of Frankfort has doubtless, for whatever reasons, seen fit to make Consolidated's position in that city very difficult. Consolidated has rigorously pursued legal claims in state and federal courts to seek to indicate its asserted rights. While I concur in the result reached in this case, I find the issues unclear and I fail to find authoritive Kentucky state decisions that confirm the right of municipal ownership and/or operation of a CATV system in Kentucky. *See Consolidated Television Service, Inc.* v. *Leary,* 382 S.W. 2d 78 (Ky. 1964).

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

Civil Action No. 82-69

CONSOLIDATED TELEVISION CABLE SERVICE, INC. - - - - - - - *Plaintiff*

v.

THE CITY OF FRANKFORT, KENTUCKY; ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY; AND COMMUNITY SERVICE, INC. - - - - - *Defendants*

MEMORANDUM OPINION AND ORDER

Entered April 28, 1987

This matter is before the court on defendants' motion to dismiss on grounds hereinafter indicated.

PARTIES

The parties to this action are:

1. *Plaintiff, Consolidated Television Cable Service, Inc.* ("Consolidated"), is a private, for profit corporation, which operates a cable television (CATV) system in Frankfrort, Kentucky.

2. *Defendant, City of Frankfort, Kentucky* ("City"), is a second class city in the Commonwealth of Kentucky.

3. *Defendant, Electric & Water Plant Board of the City of Frankfort, Kentucky* ("Board"), is an agency of

the City of Frankfort which operates an electric and water plant system in Frankfort, pursuant to KRS 96.160 and 96.171-96.188.

4. *Defendant, Community Service, Inc.* ("Community"), is a non-profit corporation formed by the City and Board which operates a publicly financed and municipally owned CATV cable system in Frankfort. The legal Characterization of the relationship among the defendants is one of the principal issues in this case.

FACTS

A. GENERAL

When television became popular in the late 1940's Frankfort, due to its topography and geography, was at a disadvantage in obtaining adequate reception of television broadcasts. In an effort to remedy Frankfort's inability to receive broadcasts on home antennae, the City and the Board consulted with Radio Corporation of America (RCA). RCA perfected a method by which multiple signals could be received through a single high antenna and distributed to homes by means of a coaxial cable. The Board created a non-profit, non-stock corporation, known as Community Service, Inc., to operate the new system that RCA had invented and which was owned by the City.

The Board and Community entered into a contract in August of 1952. This contract was to run for one year and permitted Community's use of the Board's existing equipment as well as any extensions the Board might need to build in order to supply television service. No consideration was given but the contract provided for Community to reimburse the Board for any costs expended in construction. The title to all units constructed was vested in the Board.

In September of 1955 a new contract was entered into between the Board and Community. This contract was to

run for 10 years and permitted Community to operate the CATV system in the City. The entire television system was leased to the corporation. The contract further provided that Community was to remain a non-profit corporation with all sums realized going to charity. The consideration for rental of the system was to be $1.00 per year.

By 1958 almost all the valley section of Frankfort was being served, except two fairly large areas in east and north Frankfort. Community had not extended this system to these areas for financial reasons. In 1958 plaintiff requested and in 1959 was granted a contract by the Board. This contract permitted Consolidated to construct a coaxial cable system for the unserviced areas of the city. It also permitted plaintiff to use city-owned utility poles in those areas.

By 1960 Consolidated had expanded as far as it could under its contract with the Board. It requested permission to extend its cable system into the same areas then being served by Community. The Board denied Consolidated's request to expand its pole attachments. As a consequence, plaintiff brought the first of the lawsuits which proceeded the present suit. (These lawsuits will be dealt with below.)

The contracts between plaintiff and defendant Board, and Community and the Board, expired in 1965. Both parties were permitted to operate their cable systems in Frankfort with a contract for about 18 months. In 1967 Community was given a new contract but Consolidated was not. Community's new contract was for a period of five and one-half years and allowed Community to use all poles owned by the local telephone company and the plant board for $1.00 per year. One provision of this contract required Community to allow the Board chairman to nominate three members to Community's board of directors. In 1978 the defendant Board and Community entered into another con-

tract which was to extend for 10 years the prior supplemental contract of March 1971.

In 1976 Consolidated again requested permission to expand its cable system. This time defendants refused to permit them to do so allegedly because plaintiff was suing defendants.

In 1982 Consolidated again requested to expand its pole attachments throughout the City of Frankfort. The defendants, City, Community, and Plant Board, again denied Consolidated's request. That denial led to the present suit.

B. HISTORY OF LITIGATION

Lawsuit #1. In May of 1960 plaintiff brought suit against defendants, the members of the Electric and Water Board of Frankfort, in Franklin Circuit Court demanding injunctive relief. It asked the court to require defendants to permit it to use any and all poles owned by the Board. This suit was dismissed on the grounds that the Board had no legal duty under state law to allow plaintiff to use its poles. (See Exhibit "B" in Exhibits to Memorandum in Support of Defendants' Motion to Dismiss, "Exhibits"). Plaintiff appealed the decision but the former Kentucky Court of Appeals (then the Commonwealth's highest court) affirmed the dismissal in *"Consolidated Television Cable Service, Inc.* v. *Leary,* 382 S.W. 2d 78 (Ky. 1964). (See Exhibit "D.") The court held "[t]his Court has no power to compel it to allow anyone, even appellant, to use the poles." *Id.* at 81.

Lawsuit #2. In a case styled *Norrell* v. *Judd,* Howard Norrell, the president of Consolidated, brought suit as a taxpayer to void the contract between the plant Board and Community which provided for service to be extended into the Leestown housing project in Frankfort. The trial court found for the Board on an absence of standing ground.

However, the former Court of Appeals reversed and held that if a conflict of interest was found to exist, such interest would void the contract. *Norell* v. *Judd,* 374 S.W. 2d 192, 194 (Ky. 1964).

Further proceedings in the trial court resulted in a judgment declaring the contract void *ab initio* and an injunction against Community. Meanwhile, however, the Board cancelled its contract with Community and instituted regulations allowing any cable company to operate in Leestown. This left Community with the advantage of having preexisting equipment in place. Therefore, Consolidated was allowed to amend its pleadings and pray that Community be prevented from benefiting from any previous void contract. The trial court so ordered. Norrell appealed because the trial court had not ordered Community to remove its facilities from the project. That appeal was consolidated with a similar suit regarding the Sutterlin housing project.

Lawsuit #3. In another lawsuit, plaintiff sought to require Community to remove its facilties from the Leestown Project which was the subject of Lawsuit #2 as well as another housing project called Sutterlin. Plaintiff argued that this was necessary to place plaintiff and Community on equal competitive grounds. The trial court ruled for the defendants and the former Court of Appeals affirmed. *Norrell* v. *Judd,* 387 S.W. 2d 7, 10 (Ky. 1967). The Court of Appeals held that in this "taxpayer suit" there was no reasonable relationship between the relief sought and the public interest.

Lawsuit #4 and #5. In July 1971 Howard Norrell filed suit in Franklin Circuit Court seeking to enjoin the expansion of the city system into east Frankfort on the ground that the contract between the plant Board and Community was void as ultra vires.

In October of 1971, while the state court suit was still pending, plaintiff filed suit in the United States District

Court for the Eastern District of Kentucky at Frankfort. In that complaint, plaintiff alleged that defendants were violating Kentucky's antiduplication statute as well as the equal protection clause of the Fourteenth Amendment to the United States Constitution. There followed considerable jockeying of amended complaints in the state court apparently due to inconsistencies of allegations.

On November 22, 1971 Judge Moynahan dismissed the federal suit. In a Memorandum Opinion, Judge Moynahan held that there was no violation of the antiduplication statute in that the plaintiff's cable system was not a public utility within the meaning of KRS 96.045. In addition, he noted that, in his opinion, even if the city's operation of its cable TV system was illegal as a matter of law, this fact would not render the city's competition with the plaintiff a violaton of any rights guaranteed by the United States Constitution. (See Exhibit "I.")

The United States Court of Appeals for the Sixth Circuit affirmed Judge Moynahan in *Consolidated TV Cable Serv., Inc. City of Frankfort,* 465 F. 2d 1190 (6th Cir. 1972). The court held first that the City's operation of its own cable system did not violate equal protection, but rather the City had the right to use its own utility poles. Second, the court held that contentions as to the antiduplication statute did not involve federal constitutional rights but were questions of state law which should be determined by the Commonwealth. The court further held that plaintiff's due process rights were not violated by the City's failure to condemn plaintiff's cable system under Kentucky's antiduplication statute. The court also held that no federal constitutional rights of Consolidated were violated by Community's barred status. Plaintiff had argued that the City should condemn their system and failure to do so was a taking of their property. The Sixth Circuit held that since the record did not disclose that the City had taken any

property owned by Consolidated and was doing nothing more than using its own utility poles, they found no violation of the due process clause. *Id.* at 1193. (See Exhibit "K.")

Lawsuit #6. Subsequent to the Sixth Circuit's affirmance of Judge Moynahan's decision, plaintiffs went back to state court and filed a new suit requesting a declaration of rights. (See Exhibit "L.") Defendants moved to dismiss on the ground that the 1971 state suit was still pending. This motion was purportedly sustained in April of 1973, but the complaint for declaration of rights was treated as a Fourth Amended Complaint of the 1971 state action.

In an opinion and order, dated November 2, 1976, Judge Meigs in the Franklin Circuit Court dismissed the complaint on grounds of *res judicata.* The judge held that the former judgment of *Consolidated* v. *Leary,* as well as *Norrell* v. *Judd,* were conclusive upon the parties and barred this action. (See Exhibit "M.") The court held that the ultimate question was whether the city had legal authority to operate a cable TV system and if so whether it violated provisions of the antiduplication statute. The court held that that question had been litigated at 382 S.W. 2d 78, and plaintiff had had the same opportunity to litigate this issue in two other suits. *Id.* at page 2.

In *Norrell* v. *Electric and Water Plant Board,* 557 S.W. 2d 900 (Ky. App. 1977), the new Court of Appeals affirmed as to the question of the authority of the City of Frankfort to operate a cable TV system, but reversed as to the question of duplication of utilities. (See Exhibit "N".) The case was remanded on the issue of duplication of utilities. On remand, the trial court found for the defendants and the Court of Appeals affirmed. (See Exhibit "O".)

Thus this action, filed December 23, 1982, is the most recent series of lawsuits among these parties involving in essence the contentions of Consolidated that it has been

illegally hindered in attempts to operate a cable television business in Frankfort. The contentions of plaintiff in this action may be found in its Second Amended Complaint, filed June 11, 1985.

Here, plaintiff contends that the City by favoring Community as described above, and particularly by denying Consolidated use of the City's utility poles, is violating the antitrust laws of the United States and the Constitution of the United States.

Plaintiff seeks treble damages and an injunction requiring the Board to sever its relations with Community and deal with Consolidated on an equal basis.

ISSUES

The following issues are now before the Court, raised by the defendant's motions to dismiss or for summary judgment.

Item 1: Is this action barred by the statute of limitations?

Item 2: Are either of plaintiff's claims barred under principles of *res judicata,* collateral estoppel, and/or judicial estoppel?

Item 3: Is plaintiff's antitrust claim barred by the state action immunity doctrine.

CONCLUSIONS OF THE COURT

1. The Court finds it is not necessary to reach the statute of limitations issue because it has concluded that the complaint must be dismissed in light of its resolution of the other issues.

2. In regard to the *res judicata* issue, the Court holds that the antitrust claims are not *res judicata* even in the light of the voluminous preceeding litigation, however, all 42 U.S.C. Section 1983 claims are barred by the decision

of this Court (per Judge Moynahan) in *Consolidated Television Cable Service, Inc.* v. *City of Frankfort,* ultimately affirmed by the United States Court of Appeals for the Sixth Circuit, 465 F. 2d 1190 (6th Cir. 1972). Further, The plaintiff is collaterally and judicially estopped from asserting that Community is not an agency of the Board and the City by the federal litigation and also the state litigation.

3. The defendants are immune from antitrust action under the state action exemption.

ANALYSIS

STATUTE OF LIMITATIONS

As stated above, the Court concludes that it is unnecessary to deal with the statute of limitations arguments. These arguments are particularly complex with regard to the antitrust claims. Resolution of the limitations arguments could well involve questions of fact which do not arise in connection with the other issues in this case. Since the other issues are sufficient to dispose of the case, the court will not consider the statute of limitations arguments.

RES JUDICATA AND COLLATERAL OR JUDICIAL ESTOPPEL

Recently, this court had occasion to review the law of *res judicata* and collateral estoppel (claim and issue preclusion) in its opinion in *Barnes* v. *McDowell,* 647 F. Supp. 1307, 1311, n.6 (E.D. Ky. 1986). There, quoting *Migra* v. *Warren City, infra,* and the Supreme Court's succinct definitions, this court noted:

> "6. The use of the terms 'issue' and 'claim preclusion' has been explained as follows:

'The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." See Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure Section 4402 (1981). Res judicata is ofen analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See Restatement, *supra,* Section 27. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar. See *id.,* Introductory Note before §24. *Migra* v. *Warren City School District Board of Education,* 465 U.S. 75, 104 S. Ct. 862, 894, n.1, 79 L. Ed. 2d 56 (1984)."

With regard to plaintiff's constitutional claims brought under 42 U.S.C. §1983, it is clear that they are barred by collateral estoppel, if not by *res judicata.* This distinction is made because the causes of action in the various previous lawsuits are not clearly defined. However, the §1983 issues have been previously litigated and decided adversely to the plaintiff.

On November 22, 1971, Judge Moynahan dismissed an action brought by the plaintiff against these same defendants. In that action (Lawsuit #5, *supra*), the plaintiff at-

tempted to enjoin the defendants from expanding the operation of Community into areas served at that time by Consolidated. One of the contentions of the plaintiff was that "the mere operation by the City of its CATV system is unlawful competition from which the plaintiff is entitled to protection [under the Constitution of the United States]". Exhibit "I," Memorandum Opinion, page 2.

In affirming Judge Moynahan's judgment dismissing that action, the United States Court of Appeals for the Sixth Circuit held:

> ". . . we agree with Judge Moynahan that the City's operation of its own CATV system does not violate any rights of Consolidated protected by the Constitution of the United States."

465 F. 2d at 1193.

Further, in many of the actions by the plaintiff in state court, where the same relief as that sought here was sought, the same constitutional arguments could have been raised. Therefore, all the constitutional claims raised here are barred by prior decisions in other actions between the parties.

The District Court and Appellate Court opinions in this prior litigation also have significance with regard to another critical issue in this case. This is whether or not Community is an agency of the Plant Board and City. In the course of his opinion, Judge Moynahan stated that: "(For convenience, the City of Frankfort, Kentucky, the Electric and Water Plant Board of the City of Frankfort, Kentucky, and Community Service, Incorporated, the respective defendants in this action, will be hereinafter individually and collectively referred to as 'the City.')"

In its opinion, in note 2, the Appellate Court stated:

> "The complaint avers that Community since 1967 has been under the control of the Plant Board and is an agency of the Plant Board. The opinion of the District Judge refers to Community, the City of Frankfort and the Plant Board as the 'City.' It seems to be undisputed that the actions of Community referred to in this opinion, in substance and practical effect are, the acts of the municipal corporation, the City of Frankfort."

Further, the Plant Board and Community were treated as one entity in at least one of the state decisions regarding the continuing controversy between these parties. See *Norrell* v. *Electric Water and Plant Board,* 557 S.W. 2d 900 (Ky. App. 1977). As indicated in the authorities cited above, a federal court in passing on a defense of *res judicata* must apply the law of the forum state. *Migra* v. *Warren City District Board of Education,* 465 U.S. 75, 104 S. Ct. 892 (1984); *Carman* v. *First National Bank of Louisville,* 642 F. Supp. 862 (W.D. Ky. 1986). Thus it appears that Consolidated is barred by collateral estoppel from relitgating the status of Community as an agency of the City. Community and the City are one and the same for the purposes of this litigation.

The court further finds that the plaintiff is judicially estopped from taking a position inconsistent with the position Consolidated took in prior litigation with regard to the status of Community. *Edwards* v. *Aetna Life Ins. Co.,* 690 F. 2d 595 (6th Cir. 1982); *Coal Resources, Inc.* v. *Gulf & Western Indus., Inc.,* 645 F. Supp. 1028, 1033 (S.D. Ohio 1986). Finally, from its review of the record, the Court finds that as a matter of law, Community in effect operates as a *de facto* agency of the City and Plant Board.

THE DEFENDANTS ARE IMMUNE FOR THE ANTITRUST CLAIMS OF THE DEFENDANT BY REASON OF THE STATE ACTION EXEMPTION TO THE ANTITRUST LAWS

As the court has stated above, plaintiff is barred by the principles of collateral estoppel from asserting in this case that the City, the Plant Board, and Community are one *de facto* entity. As also stated above, the court further finds from its own review of the record that there is no genuine issue of material fact in this regard and that they do operate as one entity. Although it would seem that there may be some problems of state municipal law regarding the management of Community and the manner in which it utilizes its revenues, these are matters of state law that are not before the court and indeed have not been raised. The court notes that none of the state decisions rendered in the course of the ongoing previous litigation between these parties found fault with the way these defendants working as a unit have served the people of Frankfort with cable television service over the years.

Therefore, like Judge Moynahan and the United States Court of Appeals for the Sixth Circuit, this court "will consider" the three defendants as essentially one municipal entity. Certainly, even if not the proper basis for collateral or judicial estoppel, these decisions are a strong precedent.

That being the case, it is clear that the defendants had the option of operating their own cable TV service in lieu of letting it out for franchise, or leaving the market to private competitors. KRS 96.010; *Ray* v. *City of Owensboro,* 415 S.W. 2d 77 (Ky. 1967); *City of Owensboro* v. *Top Vision Cable Company of Kentucky,* 487 S.W. 2d 283, 287, *cert. denied* 411 U.S. 948 (1973); *Hopkinsville Cable TV, Inc.* v. *Pennyroyal Cable Vision, Inc.,* 562 F. Supp. 543, 546 (W.D. Ky. 1982); Kentucky Constitution Sections 163, 164;

City of Los Angeles v. *Preferred Communications, Inc.*, 106 S. Ct. 2034, 2036 (1986) (Court affirmed dismissal of antitrust claims in similar action).

In the opinion of this court, all the defendants are clearly entitled to summary judgment on this ground under the doctrine enunciated by the Supreme Court in *Parker* v. *Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943), which created a state-action exemption from the antitrust laws.

The *Parker* doctrine, *supra*, has been elaborated upon the court over the years in a series of cases culminating in *Town of Hallie* v. *City of Eau Claire*, ___ U.S. ___, 105 S. Ct. 1713 (1985). The development of the law in this area being throughly explicated in *Town of Hallie, supra*, it will not be repeated here. *See also*, Garland, *Anti-Trust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. (1987), and *Southern Motor Carriers Rate Conference, Inc.*, v. *U.S.*, 471 U.S. 48, 105 S. Ct. 1721 (1985).

Suffice it to say, that the bottom line of this area of the law after *Town of Hallie, supra*, is that a municipal defendant may claim the protection of the state action exemption if it can pass two tests. First, it must be able to show that its conduct which is alleged to have anti-competitive effect is pursuant to a clearly articulated state policy. For this test to be met, the legislature need not expressly state in a statute or legislative history that it intends for the delegated action to have anti-competitive effects. Rather, it is sufficient if the legislature has delegated to the city "the express authority to take action that foreseeably will result in anti-competitive effects." 105 S. Ct. 1719.

Second, if the defendant is a private party, the defendant must demonstrate active state supervision of the anti-competitive behavior. At the earlier stages of this action, the plaintiffs had a strong argument in that there was no "active state supervision" of the defendants' activities in

operating the cable TV system. At that time, it was not clear whether this requirement was to be imposed on activities by the municipality, as opposed to a private party. However, this issue is laid to rest by *Town of Hallie, supra,* where the court held that where the actor is a municipality, the active state supervision requirement is not to be imposed. 105 S. Ct. at 1720-21. Therefore, since this court has held, as stated above, that the defendants are to be regarded for purposes of this action as one entity—a municipal entity—it is clear that this second requirement need not be met. *Riverview Investments* v. *Ottawa Community Improvement Corp.,* 769 F. 2d 324, 329 (1985), *modified,* 774 F. 2d 162 (1985). This distinguishes the instant case from *City Communications, Inc.* v. *City of Detroit,* 650 F. Supp. 1570 (E.D. Mich. 1987), where the city was immune from antitrust liability but a private franchisee was not. Here all defendants are municipal entities, in the view of this court for the reasons stated above.

Therefore, both the requirements of the state action exemption have been fulfilled here and all defendants are immune from the antitrust claims asserted herein. *Accord: Preferred Communications, Inc.* v. *City of Los Angeles, California,* 754 F. 2d 1396 (9th Cir. 1985), *aff'd* 106 S. Ct. 2034 (1986).

OTHER ISSUES RAISED BY THE PARTIES

The preceding analysis renders decision on the other antitrust issues raised by the parties — the "plurality of actors," the Noerr-Pennington doctrine, the Local Government Antitrust Act, and the predatory pricing practices issues—moot.

Therefore, for the reasons stated above,

It Is Ordered that the motions for summary judgment be, and they are, hereby granted and that the action be dis-

missed. A separate judgment is entered concurrently herewith.

This 27th day of April, 1987.

(s) William O. Bertelsman
William O. Bertelsman, Judge

APPENDIX C

COURT OF APPEALS OF KENTUCKY

CONSOLIDATED TELEVISION SERVICE, INC., - - *Appellant,*

v.

JOSEPH J. LEARY et al., - - - - - *Appellees.*

June 12, 1964.

Rehearing Denied Oct. 9, 1964.

Action by privately owned corporation engaged in business of furnishing coaxial cable television service for profit to city residents for mandatory injunction requiring public corporation owned and operated for benefit of people of city to permit private corporation to use all poles owned by public corporation in city and in outlying areas. The Circuit Court, Franklin County, Henry Meigs, J., sustained motion by public corporation for summary judgment, and appeal was taken. The Court of Appeals, Stewart, J., held that refusal of public corporation, which had caused creation of self-perpetuating nonprofit corporation for purpose of extending operation of television distribution service by means of coaxial cable, to permit privately owned corporation to use the poles except in specific places with stipulation that private corporation would not interfere with operation of nonprofit corporation was not necessarily an unconstitutional discrimination.

Affirmed.

1. Constitutional Law Key 204

Refusal of public corporation which had caused creation of self-perpetuating nonprofit corporation for purpose of extending operation of television distribution service by means of coaxial cable to permit privately owner competitor of nonprofit corporation to use utility poles of public corporation except in specific places with stipulation that competitor would not interfere with operation of nonprofit corporation was not necessarily an unconstitutional discrimination.

2. Electricity Key 9(1)

Public corporation owned and operated for benefit of people of city had no duty to lease its utility poles to anyone, and Court of Appeals lacked power to compel public corporation to allow anyone to use the poles.

William E. Johnson, Darnell, Johnson & Burton, Frankfort, for appellant.

Marion Rider, Frankfort, for appellee.

STEWART, Judge.

Appellant, Consolidated Television Service, Inc., is a privately owned corporation engaged in the business of furnishing coaxial cable television service for profit to the residents of Frankfort and to persons in certain outlying areas. Appellees are the members of the Electric and Water Plant Board of Frankfort, a public corporation owned and operated for the benefit of the people of Frankfort. We shall refer to appellees as "the Board."

Appellant does not own any easements or utility poles. It uses poles owned by local utilities to string its wires for furnishing the cable service in question. Appellant began business about 12 years ago, initially confining its operation to East Frankfort. Meeting with success, it attempted

to expand and sought the right to use the utility poles of the Board in all portions of Frankfort. This right had previously been granted to appellant's only competitor, Community Service, Inc., hereinafter called "Community." The Board refused general use of its poles but granted such a privilege in specified places, with the stipulation that appellant would not interfere with the operation of Community.

Appellant filed this action, asking for a mandatory injunction requiring the Board to permit it to use any and all poles owned by the Board in Frankfort and in the outlying areas where such are located. The Board then filed a motion for summary judgment supported by affidavits. After a hearing on the motion, the trial court sustained the motion. This appeal is from that ruling.

Appellant's contention is that the Board's action in refusing the use of its poles by appellant is arbitrary, discriminatory and unreasonable, since the Board permits its competitor to use the poles for the same purpose sought by appellant.

The record includes selected minutes of various meetings of the Board, detailing the inception of Community and the continuance of its relation to the Board. Two contracts with Community and a contract between the Board and appellant were filed herein. Certain affidavits were also made a part of the record. A summary of the pertinent facts taken from these writings follows.

When television began to be a popular form of entertainment in the late 1940's, Frankfort, due to its topography and geography, was at a serious disadvantage in the reception of programs of all types. In 1951, the Board, seeking to make available a facility that would bring in clear visual images accompanied by acceptable audio, obtained the services of Radio Corporation of America to accomplish this end. The latter, after two years of experiment and

the expenditure of much time and money in Frankfort, perfected a method by which multiple signals could be received through a single high antenna and distributed to individual users by means of coaxial cable.

The Board, induced by additional potential revenue that might be derived therefrom, determined to avail itself of the plan. However, it deemed it impracticable to engage in the actual operation and, for the attainment of this purpose and in order to take care of the maintenance problem and the management details, caused to be created a self-perpetuating, non-profit corporation, known as Community Service, Inc.

On August 11, 1952, the Board entered into a written contract with Community, with respect to the completion, extension and operation of the proposed television distribution service. The Board undertook to complete and extend, at its expense, the project, and Community assumed the obligation of the actual operation and of later extensions of the system. It was further provided Community out of its receipts should reimburse the Board for its investment; and that title to the facility, including any additions thereto made by Community, should be and remain at all times in the Board.

The initial agreement was for a period of one year, with the right to an automatic renewal of it from year to year and with the power to terminate it on the part of either party on written notice. On September 30, 1955, the Board entered into a new contract with Community for a period of ten years. In addition to the terms and conditions heretofore recited, the new contract provided that no person, officer, member or director of Community should receive any dividends or profits from its operation, and that all sums realized, after deducting the necessary expenses and reserve for replacement, extension or alteration of the system, should be employed for charitable or religious pur-

poses or for civic improvements in Frankfort or Franklin County.

On July 17, 1959, the Board executed a contract with appellant whereby the latter agreed to make television service available in certain specified areas in the city, not covered by Community, and the Board consented that it might use its poles in these sections for such purpose. This contract provided upon termination that "all equipment, wires and appliances on the poles used and useful in rendering such service shall revert to and become the property of the Board." Shortly thereafter this suit was filed.

Appellant claims the Board has acted in an unreasonable and arbitrary manner, relying upon this language from McQuillin, Municipal Corporations, Vol. 9, sec. 26.75, pp. 164-165, wherein it is stated:

> "Municipal licensing authorities cannot unreasonably, arbitrarily or capriciously refuse a license or permit. * * * Nor can municipal authorities grant *licenses and privileges* to certain individuals and arbitrarily deny them to others, under like conditions." (Emphasis supplied.)

The facts in the case do not disclose that the Board has ever held itself out to the public, expressly or impliedly, as engaged in the business of making its poles generally available for use to any person who might organize a business to distribute television programs by means of coaxial cable. Such a method, it is shown, was promoted by the Board as a source of new revenue to be derived from the sale of electric current required to activate television sets. In short, the record is clear that the Board pioneered in making available in the Frankfort community television signals by coaxial cable, even before such a plan was thought of by others; it was the first to put such a method in operation after it was proven to be feasible; and, having

initiated the system and established it at considerable cost, it claims it must draw the line, as it cannot allow all others who may wish to engage in a similar enterprise to use its poles in an unlimited manner.

We have in this case a situation where permission is sought to continue an existing condition while a new one of the same type is asked to be forbidden. It has been held that the hardship of taking away an established use may well be regarded as greater than that of preventing a similar new use. That is to say, it is reasonably just to classify between existing use and proposed use of the same kind.

In the case of Hines v. Jenkins, 237 Ky. 676, 36 S.W. 2d 387, the City of Bowling Green granted permits to place 51 gasoline pumps on its sidewalks. Jenkins and another person (not named) desired to install two gasoline pumps in front of their place of business to be connected with a tank or tanks beneath the sidewalk. A permit was applied for but refused because, previously thereto, the city had adopted a resolution to grant no further permits for such a purpose.

When sued, the city was perpetually enjoined from interfering with the installation of the gasoline pumps, the circuit court holding the city by refusing a permit was discriminating against Jenkins and the other person. Upon an appeal, this Court reversed, stating: "The City * * * cannot ordinarily make distinctions between different classes of its citizens, but not every classification is invalid. For example, classifications based upon time or existing conditions have frequently been upheld."

The recent case of Butler v. United Cerebral Palsy of Northern Ky., Inc., Ky., 352 S.W. 2d 203, dealt with the question, among others, of determining if public assistance could be confined only to schools engaged in the education of exceptional children, at the time of the enactment of

legislation making such assistance available, with the result that children who might attend other similar schools established thereafter would not be provided with the same benefit.

That opinion, after pointing out that classifications based upon their existing extent have been frequently upheld, determined it was not unreasonable to restrict public assistance "to existing schools already performing the type of service" under consideration in that case.

[1] Under the facts recited, and the principles of law applicable thereto, we believe the Board's refusal to grant appellant the right to use its poles did not necessarily result in unconstitutional discrimination.

Appellant contends the affidavit of O. R. Harrod, filed in support of the Board's motion for summary judgment, was inadmissible because it expressed interpretations and conclusions of the affiant and was not the best evidence. The affidavit detailed the reasons for the creation of Community and appellant asserts the trial court followed the conclusions stated in the affidavit in reaching its decision. Appellant maintains the minutes of the Board's meetings and the contracts between the parties, both of which were in the record, were the best evidence of the events about which O. R. Harrod attempted to swear.

Whether or not the affidavit was admissible is of little importance here, as the facts contained in the affidavit were also in the other writings made a part of the record. How can it be said which was drawn upon by the trial court in the decision it made?

Appellant next asserts that, if Community is an arm or adjunct of the Board, then the action of the Board in supervising, maintaining and operating a television cable service exceeds the power and authority granted to the Board by statutes governing it. Thus appellant argues that the contract between the Board and Community is void.

Appellant then says: "If said contract is void, or voidable, then there can be no valid reason for the denial of the use of the poles to appellant."

[2] This is specious reasoning. Even if the contract with Community is void or voidable, the Board is under no duty to lease its poles to anyone. This Court has no power to compel it to allow anyone, even appellant, to use the poles. Since the question here is whether appellant can compel the Board to allow it to use the poles, there is no need to discuss the authority of the Board to contract with Community.

Wherefore, the judgment is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-2076.

CONSOLIDATED TELEVISION CABLE SERVICE, INCORPORATED, - - *Plaintiff-Appellant,*

v.

CITY OF FRANKFORT, KENTUCKY, et al., - - - - - *Defendants-Appellees.*

August 2, 1972.

Application for a preliminary injunction against expansion of a city-owned CATV system. The United States District Court for the Eastern District of Kentucky, Bernard T. Moynahan, Jr., Chief Judge, denied application and dismissed complaint, and plaintiff appealed. The Court of Appeals, Harry Phillips, Chief Judge, held that city and its agencies and instrumentalities were not violating equal protection clause of Fourteenth Amendment by authorizing and making it possible for its own CATV system, which had been operating in some sections of city, to duplicate and compete with plaintiff's privately-owned system, which was operating in a different section of city, where plaintiff had no franchise, no contract and no license to continue its operations, owned no utility poles, and its contract, though authorizing it to use city-owned utility poles in specified areas of city, had expired, nor did failure of city to condemn its own system under Kentucky's antiduplication statute violate due process clause, in view of record that

city had taken no property owned by plaintiff, and was doing nothing more than using its own utility poles.

Affirmed.

1. Constitutional Law Key 211

City and its agencies and instrumentalities were not violating equal protection clause of Fourteenth Amendment by authorizing and making it possible for its own CATV system, which had been operating in some sections of city, to duplicate and compete with plaintiff's privately-owned system, which was operating in a different section of city, where plaintiff had no franchise, no contract and no license to continue its operations, owned no utility poles, and its contract, through authorizing it to use city-owned utility poles in specified areas of city, had expired. KRS 96.045; U.S.C.A. Const. Amend. 14.

2. Courts Key 282(7)

Whether city had statutory authority or power to operate a CATV system in competition with plaintiff's privately-owned system under state statute prohibiting construction of an electric, water or gas public utility duplicating existing facility without purchasing or condemning existing facility did not involve federal constitutional rights but presented questions of state law which could best be determined by courts of Commonwealth. KRS 96.045.

3. Constitutional Law Key 278(1)

Failure of city, under Kentucky's antiduplication statute, to condemn its operation of a CATV system in competition with plaintff's privately-owned system was not violative of due process clause of Fourteenth Amendment, in view of record that city had not taken any property owned by plaintiff, and was doing nothing more than using its own utility poles. KRS 96.045; U.S. C.A.Const. Amend. 14.

S. Russell Smith, Smith & Smith, Louisville, Ky., for plaintiff-appellant; James E. Shafer, Louisville, Ky., William A. Young, Young & Williams, Frankfort, Ky., on brief.

Edward F. Pritchard, Jr., Frankfort, Ky., for defendants-appellees; Allen Prewitt, Jr., Marion Rider, Ben B. Fowler, Dailey & Fowler, Frankfort, Ky., on brief.

Before PHILLIPS, Chief Judge, MILLER, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

PHILLIPS, Chief Judge.

The topography of the area in which the City of Frankfort, Kentucky, is located, is such that the inhabitants of tht City generally are unable to view commercial telecasts satisfactorily through the use of ordinary antenna systems.[1]

In 1952 the Electric and Water Plant Board of the City of Frankfort caused to be formed a non-stock, non-profit corporation, Community Service, Inc. (Community), for the purpose of providing a community coaxial cable antenna system, commonly called a CATV system, for at least a part of the residents of the City.[2]

Some of the background facts concerning CATV in Frankfort are set forth in the opinion of this court in Community Service Inc. and Consolidated Television Cable Co. v. United State et al., 418 F. 2d 709 (6th Cir. 1969), and the opinion of the Court of Appeals of Kentucky in Consolidated Television Service, Inc. v. Leary, 382 S.W. 2d 78 (Ky. 1964).

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[1]Parts of this opinion are paraphrased from the well-written memorandum opinion of District Judge Bernard T. Moynahan.

[2]The complaint avers that Community since 1967 has been under the control of the Plant Board and is an agency of the Plant Board. The opinion of the District Judge refers to Community, the City of Frankfort and the Plant Board as the "City". It seems to be undisputed that the actions of Community referred to in this opinion, in substance and practical effect, are the acts of the municipal corporation, the City of Frankfort.

Initially the City did not provide CATV services to all areas within its geographic limits. Consolidated Television Cable Service, Inc. (Consolidated), a private corporation organized for profit, was organized to provide CATV service in certain areas not served by Community. In 1959 Consolidated entered into a contract with the Plant Board which gave Consolidated the right to use, in connection with its CATV system, certain utility poles owned by the City. This contract expired by its terms on September 19, 1965. Community, with City approval, recently has begun an expansion of its CATV system. When completed this expansion will enable Community to serve areas heretofore served only by Consolidated. Community proposes to use City-owned utility poles which heretofore have been used by Consolidated pursuant to the now expired contract.

This suit was filed by Consolidated to challenge the expansion of the City-owned CATV system, contending that the acts of the City and its agencies impair obligations of contract and deny Consolidated due process of law as guaranteed by the Fourteenth Amendment. Jurisdiction of the District Court was invoked under 28 U.S.C. § 1331(a).

The District Court denied Consolidated's application for a preliminary injunction and dismissed the complaint. We affirm.

[1] Consolidated contends that the City and its agencies and instrumentalities are violating the equal protection clause of the Fourteenth Amendment by authorizing and making it possible for its own CATV system, which has been operating in some sections of Frankfort, to duplicate and compete with Consolidated's privately-owned system which is operating in a different section of the City. We find no support for this contention in the present case. Consolidated has no franchise, no contract and no license to continue its operations. It owns no utility poles. The contract with Consolidated obtained from the Plant Board in

1959 authorized it to use City-owned utility poles in specified areas of Frankfort. This contract was for a term of five years. It contained no option for renewal. It contained no restriction of the power of the Plant Board or of Community to extend their CATV services into the same area where Consolidated was authorized to use the City-owned poles. This contract did not grant or purport to grant any franchise to Consolidated, nor to guarantee Consolidated freedom from competition. It did not grant Consolidated the exclusive right to serve customers in the area covered by the contract. The contract related to the use of utility poles owned by the City and did not provide any territorial limitation as to where either Consolidated or Community could serve.

Even though the contract now has expired, the record does not disclose any action on the part of the City or its agencies to compel Consolidated to discontinue use of the utility poles. The City and its agencies are shown to be doing nothing more than to use City-owned utility poles for the extension of the CATV services provided by the City in areas presently served by Consolidated. The record shows that it has been the policy of the City and its agencies to provide CATV service to an ever increasing number of areas in the City of Frankfort, beginning with those areas where, because of topography, the need for cable television was most urgent. The pace of expansion has been limited by the policy of the Plant Board, after replacement of the initial funds advanced, of requiring the expansion to be financed on a self-sustaining basis without further grants or credits from the Plant Board.

We hold that under these circumstances the City has a right to use its own utility poles. Consolidated has no right to use these poles except under a five year contract which now has expired. Its continued use of the poles is by sufferance of the City. As heretofore stated, the City

has not seen fit to require Consolidated to discontinue use of the utility poles—it simply has decided to use these poles for its own CATV system, without requiring Consolidated to discontinue use of the same poles.

Under these circumstances we agree with Judge Moynahan that the City's operation of its own CATV system does not violate any rights of Consolidated protected by the Constitution of the United States. *See* Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Peters) 420, 9 L. Ed. 773 (1837).

See also Duke Power Co. v. Greenwood County, 302 U.S. 485, 58 S. Ct. 306, 82 L. Ed. 381 (1938); Dixie Electric Membership Corp. v. City of Baton Rouge, 440 F. 2d 819 (5th Cir. 1971); Durham v. State of North Carolina, 395 F. 2d 58 (4th Cir. 1968); Rio Grande Valley Gas Co. v. City of McAllen, 152 F. 2d 591 (5th Cir. 1945); Central Illinois Public Service Co. v. City of Bushnell, 109 F. 2d 26 (7th Cir. 1940). *Cf.* Nelson v. State Highway Board, 110 Vt. 44, 1 A. 2d 689, 118 A.L.R. 915; Arkansas State Highway Commission v. Butler, 105 F. 2d 732 (8th Cir. 1939).

[2] Consolidated contends that the City has no statutory authority or power to operate a CATV system under State law. It seeks to invoke the protection of KRS 96.045, which provides that no municipality shall construct an electric, water or gas public utility duplicating existing facility without purchasing or condemning the existing facility. These contentions do not involve federal constitutional rights but present questions of State law which at best can be determined by the courts of the Commonwealth of Kentucky.

[3] Finally it is contended by Consolidated that the failure of the City to condemn Consolidated's CATV system under Kentucky's anti-duplication statute violates the due process clause of the Fourteenth Amendment. Since the record does not disclose that the City has taken any

property owned by Consolidated, and is doing nothing more than using its own utility poles, we find no violation of the due process clause. We reemphasize that the interpretation and enforcement of the Kentucky anti-duplication statute is a matter for determination in the courts of the Commonwealth.

Affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 87-5539

CONSOLIDATED TELEVISION CABLE SERVICE, INC., - - - - *Plaintiff-Appellant,*

v.

THE CITY OF FRANKFORT, KENTUCKY;
ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY;
AND
COMMUNITY SERVICE, INC., - - *Defendants-Appellees.*

JUDGMENT—Entered September 21, 1988

Before: KRUPANSKY and WELLFORD, Circuit Judges; and GILMORE, District Judge.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

Entered By Order of the Court

Leonard Green, Clerk

(s) Leonard Green
A True Copy.

Attest:

(s) Cheryl Borkowski
(Mrs.) Cheryl Borkowski, D.C.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-5539

CONSOLIDATED TELEVISION CABLE SERVICE, INC., - - - - - *Plaintiff-Appellant,*

v.

THE CITY OF FRANKFORT, KENTUCKY;
ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY;
AND
COMMUNITY SERVICE, INC., - - *Defendants-Appellees.*

ORDER—Entered November 4, 1988

Before: KRUPANSKY and WELLFORD, Circuit Judges; and GILMORE*, United States District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petiton were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered By Order Of The Court

(s) Leonard Green
Leonard Green, Clerk

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*Hon. Horace W. Gilmore sitting by designation from the Eastern District of Michigan.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 82-69

CONSOLIDATED TELEVISION CABLE SERVICE, INC. - - - - - - - *Plaintiff*

v.

CITY OF FRANKFORT, KENTUCKY,
ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY,
AND
COMMUNITY SERVICE, INC, - - - - - *Defendants*

JUDGMENT—Entered April 28, 1987

Pursuant to the Memorandum Opinion and Order entered concurrently herewith, the court being advised.

IT IS ORDERED AND ADJUDGED that the complaint herein be, and it is, hereby DISMISSED, with prejudice, at the cost of the plaintiff.

This 27th day of April, 1987.

(s) William O. Bertelsman
William O. Bertelsman, Judge

APPENDIX E

§ 163. Public utilities must obtain franchise to use streets. —

No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

Sale of Franchises

96.010. Sale of public utility franchises by cities. — (1) At least eighteen (18) months before the expiration of any franchise acquired under or prior to the present constitution, the legislative body of each city shall provide for the sale of a new franchise to the highest and best bidder on terms that are fair and reasonable to the city, to the purchase of the franchise and to the patrons of the utility. The terms shall specify the quality of service to be rendered and, in cities of the first class, the price that shall be charged for the service.

(2) If there is no public necessity for the kind of public utility in question and if the city desires to discontinue entirely the kind of service in question, or if, in the case of cities other than those of the first class, the city owns or desires to own and operate a municipal plant to render the required service, this section shall not apply. (2741m-1, 3037d-1, 3037d-4, 3037d-6.)

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combinaton or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

(2)

No. 88-1278

FILED
FEB 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED TELEVISION CABLE SERVICE, INC. - - - - - Petitioner

versus

THE CITY OF FRANKFORT, KENTUCKY, ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY and COMMUNITY SERVICE, INC. - - Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FROM RESPONDENT ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY

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WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

RESTATEMENT OF QUESTIONS PRESENTED

1. Does state action immunity shield municipal actors from antitrust attack where such entities have acted pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition with monopoly public service?

2. Under Kentucky Constitutional and statutory provisions, are the respondents municipal actors whose manner of providing CATV services to residents of Frankfort is a reasonably foreseeable exercise of delegated powers thus shielding respondents from antitrust allegations?

3. Are petitioner's constitutional claims under 42 U.S.C. § 1983 barred by res judicata under prior state and federal decisions where such claims might have been asserted but were not asserted in such earlier actions?

LIST OF PARTIES

The named parties are the only parties to this litigation. Respondent, Electric and Water Plant Board of the City of Frankfort, Kentucky, is a municipal instrumentality existing under the provisions of KRS 96.172 through 96.188 inclusive, and has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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No. 88-1278

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED TELEVISION CABLE SERVICE, INC. - - - - - *Petitioner*

v.

THE CITY OF FRANKFORT, KENTUCKY, ELECTRIC AND WATER PLANT BOARD OF CITY OF FRANKFORT, KENTUCKY, AND COMMUNITY SERVICE, INC. - - - *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FROM RESPONDENT ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY

Respondent, Electric and Water Plant Board of the City of Frankfort, Kentucky ("Plant Board") respectfully prays for denial of the writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered September 21, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 857 F. 2d 354 and appears as Appendix A to the petition. The memorandum opinion of the United States District Court for the Eastern District of Kentucky is not reported but appears as Appendix B to the petition.

STATUTES INVOLVED

Kentucky Constitution §164 as well as §163 is involved.

STATEMENT OF THE CASE

We adopt the statement of facts contained in the opinions of the Sixth Circuit and the District Court with the addition of pertinent history of Frankfort's special situation.

In 1943, in furtherance of consumer interest, the City acquired the electric and water facilities serving Frankfort and environs in order to bring low cost nonprofit electric and water to the people through savings attendant to municipal ownership. By ordinance the Plant Board was then created.[1]

In 1946 the General Assembly of the Commonwealth enacted what is now KRS 96.172 through 96.188 inclusive, the provisions of which at that time were identical with the provisions of the 1943 City ordinance. Pursuant to this legislative enactment the City elected to operate its electric and water facilities under the pro-

[1] *Cawood* v. *Coleman*, Ky., 172 S.W. 2d 548 (1943)

visions of that statute, and thus the Electric and Water Plant Board of the City became a statutory instrumentality of the City rather than a mere agency created by ordinance.[2]

KRS 96.183 provides that the City may terminate the operation of its electric and water facilities by the Plant Board only by first adopting an ordinance directing that the sense of the voters of the City be taken and that after proper advertisement if two-thirds (⅔rds) of the voters of the City vote in favor of termination, then the City may rescind its election to operate under statute and by resolution may transfer the operation of the electric and water plant to the governing body of the municipality.

The Plant Board, although appointed by the Mayor with approval of the legislative body of the City, insures good business management of the facilities and is removed from direct political influence which has so often plagued other municipal utility ownership.

Immediately following World War II the use of electricity continued to grow at a compound rate so that the bonds issued by the City to acquire the facilities were retired in advance of their due date, and pursuant to KRS 96.182 excess revenues of the Plant Board were used to purchase bonds of the City for certain public projects from which all the people of Frankfort and vicinity have directly benefitted:[3]

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[2]*Settle* v. *Jones*, Ky., 206 S.W. 2d 59 (1947).

[3]*Perkins* v. *City of Frankfort, Ky.*, 276 S.W. 2d 449 (1955)

Consistent with its history of public service, the Plant Board pioneered in bringing cable television to the river valley in which Kentucky's capital city is located. RCA's pilot project with the Plant Board in 1952 was successful as set forth in the opinions of the court as shown below. In addition to using its utility poles to bring CATV to its users the Plant Board "induced by additional potential revenue that might be derived therefrom, determined to avail itself of the plan. However, it deemed it impracticable to engage in the actual operation and, for the attainment of this purpose and in order to take care of the maintenance problem and the management details, caused to create a self-perpetuating, non-profit corporation, known as Community Service, Inc." See *Consolidated Television Service, Inc.* v. *Leary,* Ky., 382 S.W. 2d 78 (1964) at 79.

In view of the success of the Plant Board together with the unprecedented growth of the use of electricity in the years immediately following World War II, it was natural that the Plant Board saw in cable television a two-fold opportunity for the people of Frankfort; first, low cost, non-profit cable television would be made available to consumers and secondly, the use of electricity required to activate television sets and to operate the cable system and its amplifiers, would contribute significantly to the growth of the use of electricity in the community, thus helping keep low electric rates.

Feeling it was best at that time for the operation and maintenance of the City's cable television system to repose in an agent of the Plant Board rather than the Plant Board itself, the Plant Board caused to be created a non-profit, non-stock corporation for the purpose of bringing low cost, non-profit television to the people of Frankfort and its environs, patterned somewhat after the successful manner in which electricity and water had been brought to the same people by the City through its statutory agent, the Plant Board. Such plan would increase the use of electricity and enhance the revenues of the Plant Board and extend the concept of municipal ownership and control to cable television strung upon the poles of the City along the city streets.

Beginning in 1952 the Plant Board contracted with Community to operate the City's CATV system on a low cost non-profit basis reciting that "the installation of a television distribution system in the City would produce substantial increase in the use of electric energy and its revenues". The thrust of the 1952 contract and the later contracts was to benefit the consumers or users of the City owned CATV system in the same manner as they have benefitted from the operation of the City owned electric and water facilities by the Plant Board.

Thus, the City, its statutory instrumentality the Plant Board, and Community Service effectively constituted a single entity for the ownership and operation of the City's television cable system. Indeed Con-

solidated precisely alleged this in its first suit in federal court. See *Consolidated TV Cable Service, Inc.* v. *City of Frankfort,* 465 F. 2d 1190 at 1191, footnote, number 2, which recites: "The Complaint avers that Community since 1967 has been under the control of the Plant Board and is an agency of the Plant Board. The opinion of the District Judge refers to Community, and the City of Frankfort and the Plant Board as the 'City'. It seems to be undisputed that the actions of Community referred to in this opinion, in substance and practical effect, are the acts of the municipal corporation, the City of Frankfort."

REASONS FOR DENYING THE WRIT

I

The Sixth Circuit Correctly Held in Harmony with Prior Decisions of This Court That State Action Immunity Shields Municipal Actors From Anti-Trust Attack Where Such Entities Have Acted Pursuant to "Clearly Articulated and Affirmatively Expressed State Policy" to Displace Competition with Monopoly Public Service.

The right of a Kentucky city to grant a franchise and to make available public service to its inhabitants is found in Section 163 and 164 of Kentucky's Constitution. In *Ray* v. *City of Owensboro,* Ky., 415 S.W. 2d 77 (1967) Kentucky's highest court held:

> The purpose of the section (Sec. 163) was to give the city control of the streets, alleys and public grounds and to make it possible for the city to provide the services of these utilities to its inhabitants. Therefore, the right granted is not and properly should not be restricted to those

> utilities enumerated, but *applies to all utilities and services which might today be proper subjects for control, when the original intent and purpose of the act is considered.* 415 S.W. 2d 77, 79 (emphasis ours)

The Supreme Court of Kentucky has squarely held that these provisions of Kentucky's Constitution encompass cable television service. *City of Owensboro* v. *Top Vision Cable Co.,* Ky., 487 S.W. 2d 283, 287 (1972). Cert. denied, 411 U.S. 948, 36 L. Ed. 2d 410, 93 S. Ct. 1926.

With the power to franchise cable television delegated to cities in Kentucky, Frankfort, under KRS 96.010 (2), may itself render the required service and is not required to sell any franchise. State policy in Kentucky clearly permits displacement of competition with either regulation or monopoly public service.

In *Hopkinsville Cable TV* v. *Pennyroyal Cablevision, Inc.,* 562 F. Supp. 543 (1982) the United States District Court for the Western District of Kentucky held that the acts of the city and its agents in awarding an exclusive franchise to Pennyroyal fell within the ambit of immunity from Sherman Act liability enunciated in *Parker* v. *Brown,* 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943).

Direct and clear action by Kentucky with respect to CATV was squarely held in *Pennyroyal, supra,* where the court said:

> . . . the Commonwealth of Kentucky clearly directed and authorized City to take the actions

> which are the subject of Hopkinsville Cable's antitrust claims. Kentucky is not neutral concerning cable television franchises. Kentucky's highest appellate court has ruled that cable television systems fall within Section 163 of the Kentucky Constitution. *City of Owensboro* v. *Top Vision Cable Co.,* 487 S.W. 2d 283, 287 (Ky. 1972). Section 163 grants municipalities the authority and responsibility to control the entry of public utilities into the municipal marketplace by requiring such utilities to obtain a franchise before they can operate within a municipality. *Thus, the Commonwealth of Kentucky grants City the same authority to create a monopoly for a provider of cable television as for a provider of electricity.* Clearly, the actions of City, about which Hopkinsville Cable complains, were "municipal conduct engaged in 'pursuant to state policy to displace competition with regulation or monopoly public service' ". Therefore, Parker shields the actions of City and its agents . . . from antitrust liability. 562 F. Supp. 543, 546. (emphasis ours)

The Sixth Circuit has previously relied on the interpretation of state law by the courts of that state in concluding that a municipal actor is entitled to state action immunity from antitrust allegations. See *City of North Olmstead* v. *Greater Cleveland Regional Transit Authority,* 722 F. 2d 1284 (6th Cir. 1983) Cert. denied 476 U.S. 1205 (1984).

Immunity from antitrust attack upon the respondents is in harmony with the decision of the Ninth Circuit in *Preferred Communications* v. *City of Los Angeles,* Cal. 754 F. 2d 1936 (1985) which held that a political

subdivision is *not* required to be "able to point to a specific detailed legislative authorization before it may properly assert a Parker defense in antitrust suit". As the court said:

> Were it otherwise, the specter of antitrust liability would unduly hamper the state's ability to allocate governmental authority between itself and its subdivisions. Restricted too would be its use of municipalities to regulate areas requiring flexibility and the exercise of wide discretion at the local level. 754 F. 2d 1396, 1414

The Ninth Circuit affirmed dismissal of the antitrust claims but reversed as to First Amendment claim. In dismissing the antitrust claims it was emphasized that state action is immune from the antitrust laws because the state itself has decided to act. 754 F. 2d 1936, 1415.[4]

The Sixth Circuit clearly followed the decision of this Court in *Town of Hallie* v. *City of Eau Claire,* 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713. To prove "that a state policy to displace competition exists, the municipality need not 'be able to point to a specific detailed legislative authorization' in order to assert a successful Parker defense to an antitrust suit". 471 U.S. 39, 85 L. Ed. 2d 24, 29, 105 S. Ct. at 1718. "Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated

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[4]This Court granted certiorari only with respect to the First Amendment claim (See *Los Angeles* v. *Preferred Communication,* 476 U.S. 488, 490, 90 L. Ed. 2d 480, 485; 106 S. Ct. 2034, 2036).

function". 471 U.S. at 47, 85 L. Ed. 2d at 34, 105 S. Ct. at 1721.

The Writ should be denied because the decision of the Sixth Circuit is strongly supported by recent prior decision of this Court dealing with state action immunity of municipal actors from the Sherman Act liability under *Parker* v. *Brown, supra,* and its progeny.

II

The Sixth Circuit Correctly Held in Harmony with Prior Decisions That Under Kentucky Constitutional and Statutory Provisions the Respondents are Municipal Actors Whose Manner of Providing CATV Services to Residents of Frankfort Is a Reasonably Foreseeable Exercise of Delegated Powers Thus Shielding Respondents from Antitrust Allegations.

The Sixth Circuit correctly held that there exists under Kentucky law a "clearly articulated and affirmatively expressed" state policy to allow municipal regulation or the providing of CATV service, and foreseeably, to displace competition. Unlike the neutral provision of the Home Rule statute considered in *Community Communications Co.* v. *Boulder,* 455 U.S. 40, Kentucky law, as found in its Constitution and statutes, and as interpreted by its court of last resort, is not neutral but clearly contemplates the type of anticompetitive conduct alleged by petitioner.

KRS 96.010 (2) dispenses with the need to issue a franchise "if . . . the city owns or desires to own and operate a municipal plant to render the required service . . ." Anticompetitive conduct is immune so long as it is "a reasonably foreseeable exercise of de-

lated powers". In *Hybud Equipment Corp.* v. *City of Akron, Ohio,* 742 F. 2d 949 (1984), cert. denied, 471 U.S. 1004 (1985), the Sixth Circuit held that "if the challenged restraints are reasonably related to an agency's express powers and reasonably designed to promote the state aims within a designated field of regulation they can be found to result from a 'clearly and affirmatively expressed state policy' to displace competition" (742 F. 2d at 960).

Kentucky's policy of allowing municipal ownership is clearly articulated and affirmatively expressed. Low cost nonprofit service resulting from municipal ownership benefits the users. The lowest CATV rates consistent with sound management is not predatory pricing but public service. Frankfort is not required to franchise for profit CATV thus insuring higher rates.

As this Court observed in *Hoover* v. *Ronwin,* 466 U.S. 558, 574, 80 L. Ed. 2d 590, 603, 104 S. Ct. 1989, "the reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act. The Court did not suggest in Parker, nor has it suggested since, that a state action is exempt . . . only if the sovereign acted wisely . . .".

The Sixth Circuit correctly held that state action immunity should not be denied because the respondents alleged actions represent a misapplication of state law. Errors in the administration of powers conferred by the state should be left to state tribunals to control. *Llewellyn* v. *Crothers,* 765 F. 2d 769 (9th Cir. 1985).

Boone v. *Redevelopment Agency of San Jose,* 841 F. 2d 886 (9th Cir. 1988).

The respondents authority to own and operate municipal CATV was settled in *Norrell* v. *Electric and Water Plant Board,* Ky. App. 557 S.W. 2d 900 (1977). As the Sixth Circuit held whether the state authorized provision of CATV precisely as the arrangement among the respondents contemplates is better left to the determination of state courts. See *Consolidated Television Cable Services, Inc.* v. *City of Frankfort,* 465 F. 2d 1190 (6th Cir. 1972). The Sixth Circuit's holding that the respondents manner of providing CATV services to users in Frankfort and vicinity is reasonably foreseeable is in accordance with prior federal decisions. Such holding being in accordance with prior applicable decisions herein cited, the writ sought by petitioner ought to be denied.

III

In Accordance with Prior Decisions of this Court the Sixth Circuit correctly Held That Petitioner's Constitutional Claims under 42 U.S.C. §1983 are Barred by Res Judicata Under Prior State and Federal Decisions Where Such Claims Might Have Been Asserted But Were Not Asserted in Such Earlier Actions.

The Sixth Circuit focused upon two earlier cases: *Consolidated Television Service, Inc.* v. *Leary,* 382 S.W. 2d 78 (Ky. 1964) and *Consolidated Television Service* v. *City of Frankfort,* 465 F. 2d 1190 (6th Cir. 1972) and correctly concluded that petitioner's constitutional claims under 42 U.S.C. 1983 could have

been presented in those earlier actions but were not and hence are now barred by res judicata.

In *Leary, supra,* petitioner objected to the City's denying it the right to use city poles. Kentucky's then highest court affirmed dismissal and said in pertinent part:

> Under the facts recited, and the principles of law applicable thereto, we believe the Board's refusal to grant appellant (petitioner here) the right to use its poles did not necessarily result in unconstitutional discrimination. 382 S.W. 2d 78, 81.

In *City of Frankfort, supra,* petitioner in 1971 sued the respondents alleging unconstitutional impairment of contract, and violation of the due process and equal protection clauses of the Fourteenth Amendment. The Sixth Circuit affirmed dismissal by the District Court saying "the city's operation of its own CATV system does not violate any rights of Consolidated protected by the Constitution of the United States". 465 F. 2d at 1193

The preclusive effect of a prior state court judgment is determined by looking to the law of that state. *Kremer* v. *Chemical Construction Corp.,* 456 U.S. 461, 72 L. Ed. 2d 262, 102 S. Ct. 1883, and *Migra* v. *Warren County School Dist. Bd. of Ed.,* 465 U.S. 75, 79 L. Ed. 2d 56, 104 S. Ct. 892. In *Migra* this Court remanded to District Court for application of the state preclusion law of Ohio. Hence, the Sixth Circuit in harmony with the foregoing decisions gave *Leary, supra,* the

same preclusive effect in the federal courts as it would have in Kentucky courts.

In *Newman* v. *Newman*, 451 S.W. 2d 417, 419, Kentucky held "it has long been recognized that a party may not split his cause of action, therefore, if a cause of action should have been presented and the party failed to do so and the matter should again arise in another action, it will be held that the first action was res judicata as to all causes that should have properly been presented . . ." 451 S.W. 2d at 419.

The Sixth Circuit correctly held that the scope of a prior federal court judgment is governed by federal law. *Cemer* v. *Marathon Oil Co.*, 583 F. 2d 830 (6th Cir. 1978). This holding accords with the decision of this Court in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424, where this Court said:

> A final Judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action (citations omitted). Nor are the res judicata consequences of a final, unappealed judgment on the merits, altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case (citations omitted). 452 U.S. at 398, 69 L. Ed. 2d at 108.

The Sixth Circuit correctly applied the decisions of this Court to petitioner's raising for the first time a First Amendment claim together with its Fifth and

Fourteenth Amendment Claims, albeit in a slightly different form, by holding that these claims should have been raised litigation in the two suits in federal and state court.

The Sixth Circuit properly rejected petitioner's claim that it could not have brought its § 1983 claims until this Court's 1978 decision in *Monell* v. *Department of Social Services,* (436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018) that municipalities were amenable to suit under § 1983.

In *Harrington* v. *Vandalia-Butler Board of Education,* 649 F. 2d 434 (6th Cir. 1981) a similar argument was rejected and res judicata applied. In 1960 and 1971 Section 1983 was not unavailable to petitioner. It was free to challenge *Monroe* v. *Pape* (365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473) to the extent that it exempted municipalities from the ambit of § 1983.

The Sixth Circuit Observed as Follows:

> The circumstances between the parties have not really changed over the past 35 years. Consolidated keeps asking for a contract to use the Board's poles and, except for the 1959-1965 contract, the Board has consistently rebuffed Consolidated. Two Courts have looked at this matter, and have concluded there is no denial of constitutional rights. At some point, litigation must come to an end. Therefore, Judge Bertlesman's ruling that Consolidated's § 1983 action is res judicata is affirmed. 857 F. 2d at 358

The holding that petitioner's constitutional claims under 42 U.S.C. § 1983 are barred by res judicata is the uncontradicted holding of this Court in *Kremer, supra, Migra, supra,* and *Moitie, supra,* and other decisions herein cited. These decisions are ample reason for the denial of the writ sought by petitioner.

CONCLUSION

The Sixth Circuit followed the most recent decisions of this Court in deciding the questions presented. Its decision is in accord with such prior decisions of this Court. There is no conflict between the 6th Circuit decision and those of other Circuits where such questions have been raised. No reason exists for granting the writ, and the same ought to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles Lee Hobson, a member of the Bar of this Court, hereby certify that on this the 23rd day of February, 1989, three (3) copies of the Brief in Opposition from the Respondent, Electric and Water Plant Board of the City of Frankfort, Kentucky, in the above entitled case, were mailed, first class postage, prepaid, to:

Mr. Joseph E. Stopher, Mr. Raymond G. Smith, and Mr. Edward H. Stopher, Boehl Stopher Graves & Deindoerfer, Suite 2300, One Riverfront Plaza, Louisville, Kentucky 40202, Counsel for Petitioner; and to

Mr. Sheryl G. Snyder, Ms. Virginia H. Snell, and Mr. William H. Hollander, Wyatt, Tarrant & Combs, 2800 Citizens Plaza, Louisville, Kentucky 40202, Counsel for Respondents, the City of Frankfort, Kentucky, and Community Service, Inc.; and to:

Mr. Allen Prewitt, Prewitt & Prewitt, 311 Wilkinson Street, Frankfort, Kentucky 40601, Counsel for Respondent, City of Frankfort, Kentucky.

I further certify that all parties required to be served have been served.

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(3)

No. 88-1278

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED TELEVISION CABLE SERVICE, INC., - - - - - Petitioner

versus

THE CITY OF FRANKFORT, KENTUCKY, ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY and COMMUNITY SERVICE, INC., - - - Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals for the Sixth Circuit correctly held that state action immunity bars all of Petitioner's antitrust claims against the City of Frankfort, Kentucky, the Electric and Water Plant Board of the City of Frankfort, and Community Service, Inc., a nonprofit municipal agent.

II. Whether previous actions by Consolidated Television Cable Service, Inc., in federal and state courts preclude its 42 U.S.C. §1983 claims under the doctrines of *res judicata* and collateral estoppel.

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SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED TELEVISION CABLE SERVICE, INC., - - - - - - - *Petitioner*

v.

THE CITY OF FRANKFORT, KENTUCKY, ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY AND COMMUNITY SERVICE, INC., - - - - *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the City of Frankfort, Kentucky, and Community Service, Inc., respectfully pray that a writ of certiorari not be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on September 21, 1989.

STATEMENT OF THE CASE

Petitioner Consolidated Television Cable Service, Inc. ("Consolidated") has brought seven lawsuits over the last thirty years challenging the City of Frankfort's municipally-owned cable television ("CATV") system. The material facts in this most recent suit are undisputed. As Consolidated pled in its Second Amended Complaint, the

City of Frankfort, Kentucky ("City"), is "duly chartered and authorized to exercise the powers conferred upon such cities by the constitution and statutes of the Commonwealth of Kentucky." The Electric and Water Plant Board ("Plant Board") is an agency and instrumentality of the City by statute and, as Petitioner recognizes, "has been delegated by the City the authority and power that the City may otherwise exercise by statute . . ." Community Service, Inc. ("Community Service") is a nonprofit, nonstock corporation, incorporated by the Plant Board for the purpose of handling day-to-day operations of the City's CATV system pursuant to its contract with the Plant Board. By statute, the City owns all property owned by the Plant Board. *See*, KRS 96.175. By contract, the Plant Board, the City's statutory agency, owns and has ultimate control of the City's CATV system.[1]

From the beginning, the development of a City-owned CATV system in Frankfort, Kentucky, was viewed as a public service. The Plant Board wanted to implement the system, but "deemed it impracticable to engage in the actual operation and, for the attainment of this purpose and in order to take care of the maintenance problem and the management details, caused to be created a self-perpetuating, nonprofit corporation, known as Community Service, Inc." *Consolidated Television Service, Inc.* v. *Leary*, Ky., 382 S.W. 2d 78, 79 (1964). The Plant Board selected the six men who incorporated Community Service and served on its first Board of Directors. On August 11, 1952, the Plant Board and Community Service executed their first contract, which was designed primarily to pro-

[1]None of these Respondents has parent companies, subsidiaries or affiliates to be disclosed pursuant to Rule 28.1 of the Rules of the Supreme Court.

vide a method for financing construction of the system. The Plant Board agreed to furnish necessary labor and materials to extend the system, and Community Service agreed to reimburse the Plant Board for its expenses out of Community Service's revenues.

Since 1952, Community Service's relationship with the Plant Board (and consequently the City) has been defined by a series of contracts. A second contract was executed in 1955 and a third in 1967. The 1967 contract has been renewed twice, first in 1971 and, finally, in 1978 for ten years. The terms and limitations imposed on Community Service through these contracts demonstrate that the City owns and controls its CATV system through its statutory agency, the Plant Board.

The 1952 contract, like all subsequent contracts, provided that title to the system and any extensions thereof remains vested in the Plant Board. Because KRS 96.175 provides that the City owns all property owned by the Plant Board, the CATV system pioneered by the Plant Board was a municipally-owned system from the beginning. The Plant Board owns the physical plant of the television system. While Community Service technically holds legal title to "operating personalty," such as vehicles and office equipment, this distinction, as a practical matter, is purely artificial: If the Plant Board failed to renew its contract with Community Service, all personalty that Community Service owns "on paper" would be turned over to the Plant Board.

Since 1955, Community Service's contracts with the Plant Board have mandated its nonprofit, nonstock status. Profits realized from the operation of the system, if any, must be used for civil improvements or charity. This provision ensures that Community Service's rates are held as low as possible while still maintaining adequate service. It

also preserves the public service orientation that led the Plant Board to develop the system.

Public control of Community Service is also maintained by a method of selecting the Community Service board. In addition to selecting the six original directors, since 1967 the Plant Board has nominated three of Community Service's six board members. *Consolidated Television Cable Service, Inc.* v. *City of Frankfort*, 857 F. 2d 354, 358 (6th Cir. 1988). Indeed, Consolidated concedes in its petition that "[t]he Plant Board has ultimate control over the continued existence of Community as a provider of cable services" [Petition at 3].

Unlike Community Service, the Petitioner, Consolidated, is a privately-owned corporation engaged in the business of furnishing cable television service for profit. It has had one contract with the Plant Board, executed in 1959, which gave it the right to use certain utility poles owned by the City in areas not served at that time by the City-owned CATV system. This contract expired on September 19, 1965. Thereafter, Consolidated's continued use of City poles, as the Court of Appeals for the Sixth Circuit noted in 1972, is "by sufferance of the City." *Consolidated Television Cable Service, Inc.* v. *City of Frankfort, et al.*, 465 F. 2d 1190, 1192-93 (6th Cir. 1972).

These facts are not unknown to federal and state courts. *See Consolidated, supra*, 465 F. 2d at 1192-93; *Norrell* v. *Electric and Water Plant Board et al.*, Ky. App., 557 S.W. 2d 900 (1977); *Consolidated Television, supra*, 382 S.W. 2d at 79. On May 6, 1960, Consolidated filed the first of its seven lawsuits in Franklin Circuit Court seeking precisely the same relief it seeks in this case: A mandatory injunction requiring the Plant Board to grant it the right "to use any and all poles owned by the Defendant, Electric and

Water Plant Board of Frankfort, Kentucky, in the City of Frankfort, Kentucky and outlying areas." Consolidated argued that by denying it the use of City poles and allowing Community Service such use, the Plant Board was treating Consolidated in a "dictatorial and discriminatory manner." The Circuit Court dismissed the Complaint finding that the Plant Board had no legal duty to allow Consolidated to use its poles.

On appeal, Consolidated presented several arguments that are virtually identical to the positions it took before the Sixth Circuit in this most recent action. First, it restated its claim that the Plant Board was acting in an unreasonable and arbitrary manner in refusing to permit Consolidated to use the poles. Second, it argued that the Plant Board was exceeding its statutory authority by engaging in a "joint venture" with Community Service and, therefore, that the contract between the Plant Board and Community Service was void. Finally, it contended that the trial court had approved, in essence, a "monopolization" of CATV service in Frankfort by Community Service by upholding the contract between the Plant Board and Community Service. As in this case, Consolidated insisted that the gravamen of its complaint was "only to be able to fairly compete with Community Service, Inc." Rejecting each of these contentions, Kentucky's highest court held that the Plant Board, being under no duty to lease its poles to anyone, could discriminate among potential users of its poles. *Consolidated Television Service* v. *Leary*, Ky., 382 S.W. 2d 78 (1964). "Having initiated the system and established it at considerable cost, it [the Plant Board] claims it must draw the line as it cannot allow all others who may wish to engage in a similar enterprise to use its poles in an unlimited manner." *Id.* at 80.

The second and third lawsuits were commenced while the first lawsuit was on appeal. Howard Norrell ("Norrell"), the current president and principal stockholder of Consolidated, brought suit as a taxpayer to void a contract between the Plant Board and Community Service, which provided for service to the Leestown Housing Project in Frankfort. The Kentucky Court of Appeals held that a conflict of interest would void the contract. *Norrell* v. *Judd*, Ky., 374 S.W. 2d 192, 194 (1964). The housing authority subsequently canceled the contract, but adopted regulations to place Community Service and Consolidated on equal footing. Consolidated then filed a third lawsuit to require Community Service to remove its facilities from the Leestown Project and another housing project called Sutterland. Removal was necessary, Consolidated maintained, to place Consolidated and Community Service on equal competitive grounds. The Kentucky Court of Appeals held that it would be contrary to the public interest to force Community Service "to root out wires and connections that it will have an instant right to restore." *Norrell* v. *Judd*, Ky., 387 S.W. 2d 7, 10 (1965). This decision had hardly appeared in the Southwest Reporter 2d when Consolidated again brought Respondents to court, again demanding equal treatment.

As a nonprofit entity, Community Service was charging uniformly low rates throughout the areas it served in the late 1960's, while Consolidated was charging different rates depending on whether it had competition in a particular area. In 1971, Consolidated's discriminatory pricing led the Plant Board to direct Community Service to extend the City's cable television service into east Frankfort, where Consolidated charged rates substantially in excess of the rates it charged in areas where it competed with

Community Service. *See, Norrell* v. *Electric and Water Plant Board,* Ky. App., 557 S.W. 2d 900, 901 (1977). This expansion sparked another sequence of suits by Consolidated charging Respondents with unequal treatment and unfair competition.

In July, 1971, Norrell, again as taxpayer, filed suit in Franklin Circuit Court to enjoin expansion of the City's system into east Frankfort. Norrell alleged that the contract between the Plant Board and Community Service was "illegal, unlawful and ultra vires." After Consolidated was added as party-plaintiff, Norrell and Consolidated amended their complaint to allege, as they do here, that the operation of a CATV system was beyond the Plant Board's authority. To complicate matters, Consolidated also filed a verified complaint in United States District Court alleging that Community Service was "under the control of and an agency of the Plant Board" and admitting, contrary to their position in the concurrent state court proceeding, that the Plant Board had the authority to own and operate the City's CATV system through Community Service.

Within a week of filing its federal action, Consolidated returned to state court and amended its complaint for a third time to delete the paragraph alleging that the Plant Board's ownership of a CATV system was ultra vires under KRS 96.160. This deletion was necessary to pursue its federal court suit in which an opposite position had been taken.

Having rectified the inconsistencies in its various positions for the time being, Consolidated pursued its federal action, taking no steps in state court until its efforts in federal court failed. The federal district court found that the City's competition with Consolidated presented no constitutional violation. Thus, the heart of Consolidated's

first appeal to the Sixth Circuit was whether the City's ownership and operation of a CATV system resulted in illegal and unlawful competition depriving Consolidated of its constitutional rights. While admitting that the City and the Board "had the discretion to determine who shall use the municipally-owned electrical light poles in Frankfort," Consolidated insisted that equal protection and due process required the City to permit use of its poles in a nondiscriminatory manner.

In *Consolidated Television Cable Service, Inc.* v. *City of Frankfort*, 465 F. 2d 1190 (6th Cir. 1972), the Sixth Circuit rejected Consolidated's allegations of illegal competitive conduct and affirmed the district court. Consolidated had no franchise, no contract, no license to continue its operations and "no right to use these [City] poles except under a five-year contract which now has expired." *Id.* at 1193. Turning to the merits of Consolidated's constitutional plea, the Sixth Circuit held that the City's operation of its own CATV system "does not violate any rights of Consolidated protected by the Constitution of the United States." *Id.*

Undeterred by failure, Consolidated returned once more to state court, not to pursue the action still pending, but to file a new suit, this time seeking a declaration of rights. It contended that the City lacked the authority to own a CATV system, or alternatively, if the City had such authority, the Court should compel the City to condemn or purchase Consolidated's system under the anti-duplication statute, KRS 96.045. Respondents moved to dismiss the complaint on grounds of *res judicata* and collateral estoppel. Impressed by the long history of litigation between the parties over essentially the same issues, the circuit

court granted the motion to dismiss. Consolidated appealed.

In *Norrell* v. *Electric and Water Plant Board*, Ky. App., 557 S.W. 2d 900 (1977), the Kentucky Court of Appeals declared that Consolidated was playing "fast and loose" with the courts. While the court found that the question of duplication of facilities had not been litigated in prior decisions, it held that Consolidated was estopped to raise the issue of the City's authority to own and operate a CATV system. Consolidated had represented to the federal district court that the City "does have the power to run a CATV system itself." *Id.* at 903. It therefore could not assume an inconsistent position in state court: "Under all of the circumstances of this case, to permit this question to be raised now would be to permit the Appellants to 'play fast and loose with the Court'" *Id.* [citations omitted].

This most recent action, filed in December, 1982, like the first lawsuit filed in 1960, concerns the Plant Board's refusal "over the last 30 years" to allow Consolidated to use City-owned electric poles. Consolidated contends that the denial of pole access creates a monopoly of the City's CATV market in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and deprives Consolidated of its constitutional rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. It asserts these claims despite its prior unsuccessful attempt to obtain pole access and despite the Sixth Circuit's prior holding, in Consolidated's fifth lawsuit, that "the City's operation of its own CATV system does not violate any rights of Consolidated protected by the United States Constitution." *Consolidated*, *supra*, 465 F. 2d at 1193.

After extensive discovery on the issue of state action immunity, the United States District Court for the Eastern

District of Kentucky granted summary judgment for Respondents. The District Court found that the *res judicata* and collateral estoppel effect of prior litigation precludes Consolidated's constitutional claims, and that the state action immunity doctrine bars its antitrust claims. The Sixth Circuit affirmed. *Consolidated Television Cable Service, Inc.* v. *City of Frankfort*, 857 F. 2d 354, 356 (6th Cir. 1988).

Consolidated now petitions this Court for a writ of certiorari to the Sixth Circuit. The petition should be denied. The Sixth Circuit's opinion is correct and conflicts with no decisions of this Court or other courts of appeals. To the contrary, it finds support in opinions of this Court and in decisions from jurisdictions that have considered the same issues. There are no important questions of federal law that are unsettled by this Court, nor are there "special and important reasons" to justify review of the Court of Appeals' decision. Sup. Ct. R. 17.1.

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit Correctly Held That State Action Immunity Bars Petitioner's Antitrust Claims.

This Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943), rests on a basic notion: Congress intended the Sherman Act only to prohibit private restraints on trade. Consequently, states are immune from antitrust suits, and municipalities are likewise immune if the state has authorized their allegedly anticompetitive activities. Thus, the central issue in deciding whether state action immunity bars Consolidated's antitrust claims is whether Respondents' allegedly anticompetitive activities were "authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service'." *Town of Hallie*

v. City of Eau Claire, 471 U.S. 34, 39 (1985), *quoting, City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978).

Consolidated misconstrues the requirement of authorization by suggesting that a Kentucky statute must refer specifically to "cable television" before authorization exists [Petition at 11]. *Town of Hallie* makes clear that a municipality need not " 'be able to point to a specific, detailed legislative authorization' in order to assert a successful *Parker* defense to an antitrust suit. . . ." *Town of Hallie, supra*, 471 U.S. 34, 39, *quoting, City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978). A municipality is immune if the state has authorized the City to regulate or provide the service and has delegated to the city the authority to take action that foreseeably will result in anticompetitive effects. *Town of Hallie, supra*, 471 U.S. at 44. *See also LaSalle National Bank of Chicago* v. *County of DuPage*, 777 F. 2d 377 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); *Riverview Invest., Inc.* v. *Ottawa Community Improv. Corp.*, 769 F. 2d 324, 329 (6th Cir. 1985), *modified*, 774 F. 2d 162 (1985); *Rural Electric Co.* v. *Cheyenne Light, Fuel and Power Co.*, 762 F. 2d 847 (10th Cir. 1985); *Independent Taxicab Drivers' Employees* v. *Greater Houston Trans. Co.*, 760 F. 2d 607 (5th Cir. 1985), *cert. denied*, 474 U.S. 903 (1985).

Kentucky law authorizes the displacement of unrestrained competition involving CATV systems with regulation or monopoly public service. Kentucky cities are authorized to regulate a CATV system's use of the public ways [1] through competition for a franchise from the city to render the service in the public interest or [2] by the city rendering the service itself. Sections 163 and 164, Ky. Const., and KRS 96.010 provide such authorization.

Section 163, Ky. Const., states:

> No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; . . .

Section 164, Ky. Const., provides:

> No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

KRS 96.010 sets forth the procedures for granting franchises and specifically authorizes cities, other than those of the first class, to own and operate a municipal plant and to render the service themselves, without complying with bid requirements.

> (2) If there is no public necessity for the kind of public utility in question and if the city desires to discontinue entirely the kind of service in question, or if, in the case of cities other than those of the first class, the city owns or desires to own and operate a municipal plant to render the required service, this section shall not apply. KRS 96.010(2).

Kentucky's highest court has decisively held that the regulatory scheme contained in sections 163-64, Ky. Const.,

and KRS 96.010 applies to services other than those specifically enumerated in section 163 of Kentucky's 1891 Constitution, including cable television service. *City of Owensboro* v. *Top Vision Cable Co.*, Ky., 487 S.W.2d 283 (1972), *cert. denied*, 411 U.S. 948 (1973). Any contrary conclusion ignores the purpose underlying section 163-64, Ky. Const., and KRS 96.010.

In *Ray v. City of Owensboro*, Ky., 415 S.W.2d 77 (1967), the appellant argued that a city had no authority to require a franchise for the operation of an ambulance service because section 163 does not specifically list the "ambulance business." Noting that Kentucky courts have construed sections 163 and 164 to authorize the franchising of automobile-bus line operations, garbage collection, and the right to extract sand from a river bed, although none of these activities are expressly listed, the Court held:

> We do not believe the right granted cities by this section [163] is today limited to these specific utilities. The purpose of the section was to give the city control of the streets, alleys and public grounds and to make it possible for the city to provide the services of these utilities to its inhabitants. Therefore, the right granted is not and properly should not be restricted to those utilities enumerated, but applies to all utilities and services which might today be proper subjects for control, when the original intent and purpose of the act is considered. *Id.* at 79.

In *City of Owensboro*, Kentucky's highest court relied on the reasoning of *Ray* to hold specifically that sections 163 and 164, Ky. Const., and KRS 96.010 apply to cable television service.

> We cannot accept Top Vision's argument that the city is not involved because the cables and wires will be placed on poles and strung over public ways where

> existing utility companies have the right to operate by other franchises. It is not shown, in the first place, that all cables and wires will be constructed and used coincidentally with existing equipment of other utilities, and, in the second place, under its general obligation to provide its citizens with safe, clean and unobstructed public ways, the presence of television cables, even in connection with existing utilities, would be an added burden on the city. We are of the opinion that the right to operate a community antenna television service in a city is a subject for franchise. *City of Owensboro, supra*, 487 S.W.2d at 287.

Consolidated fails to mention *Hopkinsville Cable T.V. Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982). There, a for-profit cable television company brought an antitrust suit against a city, its officials and a competitor, contending, as Consolidated does here, that Kentucky law was "neutral" on the subject of the cable television. Distinguishing *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982), a pre-*Town of Hallie* decision on which Consolidated relies, the Court found clear authorization in Kentucky law:

> In the case at bar, the Commonwealth of Kentucky clearly directed and authorized City to take the actions which are the subject of Hopkinsville Cable's antitrust claims. Kentucky is not neutral concerning cable television franchises. Kentucky's highest appellate court has ruled that cable television systems fall within Section 163 of the Kentucky Constitution. *City of Owensboro* v. *Top Vision Cable Co.*, 487 S.W. 2d 283, 287 (Ky. 1972). Section 163 grants municipalities the authority and responsibility to control the entry of public utilities into the municipal marketplace by requiring such utilities to obtain a franchise before they can operate within a municipality. Thus, the Common-

> wealth of Kentucky grants City the same authority to create a monopoly for a provider of cable television as for a provider of electricity. Clearly, the actions of City, about which Hopkinsville Cable complains, were "municipal conduct engaged in 'pursuant to state policy to displace competition with regulation or monopoly public service'." Therefore, *Parker* shields the actions of the City and its agents, Rutland and Rorie, from antitrust liability. *Id.* at 546.

Consolidated offers several untenable arguments against state authorization. First, it observes that cable television was not in existence when KRS 96.010 was passed [Petition at 11]. KRS Chapter 96, according to Consolidated, is entitled "Utilities in Cities"and pertains only to "electric, gas and water" utilities. Consolidated omits the rule under KRS 446.140 that chapter and section titles do not constitute any part of the law. More important, nothing in KRS 96.010 limits its application to electric, gas and water utilities. As previously discussed, *Ray*, *City of Owensboro* and *Hopkinsville* expressly hold that Kentucky's regulatory scheme extends to many activities not specifically identified in section 163, including cable television service.

Consolidated argues, of course, that the Sixth Circuit improperly relied on state court decisions construing state statutes and state constitutional provisions. The Sixth Circuit's reliance on state court decisions is hardly unprecedented, however. Federal courts have recognized repeatedly that state authorization to displace competition with regulation or monopoly public service may rest on authoritative judicial interpretations of applicable statutes and constitutional provisions. Indeed, in *Town of Hallie*, this Court noted that the Wisconsin Supreme Court's opinion is "instructive on the question of the state legislature's in-

tent in enacting the statutes relating to the municipal provision of sewer services," the statutes which authorized the municipality's anticompetitive conduct. *Town of Hallie, supra,* 471 U.S. at 44, n.8.

This Court denied certiorari in *City of North Olmsted, Ohio v. Greater Cleveland Regional Transit Authority,* 722 F. 2d 1284, 1288 (6th Cir. 1983), *cert. denied,* 467 U.S. 1205 (1984), where the Sixth Circuit relied on "the authoritative interpretation of the Ohio Regional Transportation Act given by the Ohio courts" to hold that the act contemplated anticompetitive activity.

> Based on the authoritative interpretation of the Ohio Regional Transportation Act given by the Ohio courts, we conclude that the actions of GCRTA alleged in North Olmsted's complaint were contemplated and authorized by state law and constituted state or state subdivision action in furtherance of "affirmatively expressed state policy." 722 F.2d at 1288 [citation omitted].

Consolidated points to no decision of this Court or any court of appeals holding that a definitive state court construction of a constitutional or statutory provision in insufficient to demonstrate the requisite authorization to displace competition. It suggests that reliance on state court decisions "would create 50 divergent standards and permit a state's interest in insulating municipal conduct from the antitrust laws to override the congressional mandate of competition" [Petition at 10]. This assertion fails to justify the petition for the simple reason that it ignores the central inquiry: whether the state has authorized the displacement of competition. The activities that are authorized from state to state may vary regardless of whether the authorization rests on a detailed legislative

pronouncement or a state court's interpretation of a state statute authorizing the displacement of competition. Reliance on state court interpretations does not lead to more divergent standards. No one can reasonably suggest that a decision of the state's highest court construing a legislative authorization is any less the law of the state than the statute itself. From the standpoint of federalism, it makes no difference whether the city's authorization emanates from legislative enactment or judicial interpretation of a legislative enactment; and it makes no difference whether the enactment emanated from a legislature or a constitutional convention. If the state has authorized the displacement of competition by municipal regulation, the Sherman Act is inapplicable to the city's regulatory actions. In *Town of Hallie*, this Court rejected the Town's argument for detailed authorization, observing that the argument "embodies an unrealistic view of how legislatures work and how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind." *Town of Hallie*, *supra*, 471 U.S. at 43. The same criticism applies with equal force to Consolidated's position.

Consolidated also insists that the City is not acting "pursuant to" state policy because it "has never acted to 'own' or to 'operate' a cable television system" [Petition at 15]. Predictably, Consolidated ignores its own admissions, in prior litigation, that Community Service is a municipal agent. As the federal district court observed in 1971, "the actions of Community referred to in this opinion, in substance and practical effect, are the acts of the municipal corporation, the City of Frankfort." *Consolidated*, *supra*, 465 F. 2d at 1191 n.2. The Sixth Circuit, in this seventh action, noted that there is support for applying the doctrine

of judicial estoppel to preclude Consolidated from denying that Community is the City.

Equally important, Consolidated's construction of "pursuant to" loses sight of the key inquiry: whether the City acts pursuant to a policy to displace competition. The authorization is the authorization to engage in an activity that has as its foreseeable effect the displacement of competition. Authorization does not depend on whether the City has acted properly or in good faith in implementing the regulatory scheme authorized by the state.

As the Court of Appeals for the Sixth Circuit noted, the Ninth Circuit "has twice rejected the argument that state action immunity should be denied because defendants' actions represented a misapplication of state law." *Consolidated, supra*, 857 F. 2d at 362, *citing, Llewellyn* v. *Crothers*, 765 F. 2d 769 (9th Cir. 1985) and *Boone* v. *Redevelopment Agency of San Jose*, 841 F. 2d 886 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 489 (1988). Other courts have also found that state tribunals, not federal courts, should adjudicate errors or abuses in the administration of powers conferred by the state.

In *Interface Group, Inc.* v. *Massachusetts Port Authority*, 816 F. 2d 9, 13 (1st Cir. 1987), the First Circuit held that the illegality of actions under state law "cannot make a legal difference for purposes of antitrust immunity."

> To hold otherwise would impose the antitrust laws' treble damage liability upon agencies that may have done no more than to misjudge difficult questions of state law or make administrative errors having nothing to do with antitrust policy. It would force antitrust courts to review state administrative law disputes.

Id. See also, Hancock Industries v. *Schaeffer*, 811 F. 2d 225, 235-236 (3rd Cir. 1987) (holding that the subjective

motivation of public decisionmakers is not relevant in state action immunity analysis); *City Communications, Inc.* v. *City of Detroit*, 650 F. Supp. 1570, 1576-77 (E.D. Mich. 1987) (subjective motivations of individual actors are irrelevant, and actions are immune even if the state exercises its sovereignty imperfectly); *Vartan* v. *Harrisburg Development Corp.*, 655 F. Supp. 430, 436-37 (M.D. Pa. 1987) ("it follows that actions otherwise immune should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law"). If the Court requires the kind of "authority" that Consolidated demands, "it will inevitably become the standard reviewer of governmental agencies whenever it is alleged that the agency, though possessing the power to engage in the challenged conduct, has exercised its power erroneously." Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 449-50 (1981).

Consolidated cites no case requiring federal courts to decide whether governmental agencies have properly exercised their power to displace competition as a condition to conferring immunity. It is undoubtedly unable to do so because every court that has considered the issue has refused to accept the definition of authorization that Consolidated proposes. To hold otherwise would contravene the regard for state sovereignty that underlies the doctrine of state action immunity. The relevant *policy* is the policy allowing municipalities to displace competition with regulatory discretion. Kentucky clearly has such a policy regarding the provision of CATV services. The City and Community Service clearly acted "pursuant to" that policy. As the Sixth Circuit correctly held, whether Respondents followed the letter of state law in exercising their power

is a matter for state, not federal, courts to decide. It is not a matter that determines state action immunity. The Sherman Act was never intended to be a vehicle for federal judicial review of a city's compliance with state municipal law.

II. The Sixth Circuit Correctly Held That Consolidated's Constitutional Claims are Barred by Well-Established Principles of Res Judicata and Collateral Estoppel.

The law of *res judicata* and collateral estoppel "'consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once.'" *University of Tennessee* v. *Elliott*, 478 U.S. 788, 106 S. Ct. 3220, 3226 n. 6 (1986) (citations omitted). Under *res judicata* "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). Under collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit involving a different cause of action involving a party to the first case." *Id.*

These doctrines are designed to relieve "parties of the cost of vexation of multiple lawsuits, conserve judicial resources and, by preventing inconsistent decisions, encourage reliance on adjudication." *Id.* at 415. Having unsuccessfully dragged Respondents through six lawsuits, Consolidated now demands the right to continue its campaign, arguing that it would be unfair and unjust to pose the bars that should have ended this litigation years ago. Its position contravenes any concept of *res judicata* and collateral estoppel. As this Court has stressed, "'[the] doctrine of *res judicata* is not a mere matter of practice and procedure inherited from a more technical time than

ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the court. . . .'" *Federated Dept. Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) [citations omitted]. Consolidated therefore must not be allowed to twist the theories of claim and issue preclusion and mischaracterize the matters that have been or could have been resolved in prior litigation.

The preclusive effect of a prior state court judgment is determined by looking to the law of that state. *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982). Similarly, the scope of a prior federal court judgment is governed by federal law. *Cemer* v. *Marathon Oil Co.*, 583 F. 2d 830 (6th Cir. 1978). However, Kentucky and federal courts define the doctrine of *res judicata* essentially the same, prohibiting "further claims by the parties on the same cause of action . . ." including "issues which could have been but were not litigated in the [prior] proceeding . . . ." *Vinson* v. *Campbell County Fiscal Court*, 820 F. 2d 194, 197 (6th Cir. 1987). *See also Newman* v. *Newman*, Ky., 451 S.W. 2d 417, 419 (1970) (holding under Kentucky law that *res judicata* bars "causes that should have been properly presented" in a prior action).

A. Consolidated's Prior Claims in State Court Preclude This Action.

In its Second Amended Complaint in this action, Consolidated alleges that, "[o]ver the last thirty years," the City, the Plant Board, and Community Service have acted "arbitrarily and capriciously" "to deprive plaintiff of his civil and constitutional rights by denying him access to telephone poles owned and/or controlled by one or more defendants . . . all in violation of 42 U.S.C. §1983 and the

First, Fifth and Fourteenth Amendments to the United States Constitution."

In May, 1960, Consolidated brought a state court action objecting to the same "arbitrary' treatment, including the denial of pole access. It alleged that the Plant Board and its members had "refused to permit the plaintiff to use the poles owned by defendant for the purposes hereinafter set out in all areas of the City of Frankfort, Kentucky." By allowing Community Service to use all poles in the City and outlying areas, the Plant Board allegedly was acting in an "arbitrary, capricious, dictatorial and discriminating manner." The Plant Board's motion to dismiss was granted by the state circuit court and affirmed on appeal. *Consolidated Television Service, Inc.* v. *Leary*, Ky., 382 S.W. 2d 78 (1964).

Applying the principles of *res judicata* and collateral estoppel to the judgment rendered in Consolidated's first suit, the Sixth Circuit, in this latest appeal, concluded that Consolidated's present constitutional claims are barred. The underlying facts and the relief sought are identical. The only distinction is Consolidated's citation to 42 U.S.C. Section 1983 and the United States Constitution, which legally is a distinction without a difference: Consolidated could have asserted its §1983 theory in the state court action.

> Section 1983, however, does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims.

Migra v. *Warren City School Dist. Bd. of Education*, 465 U.S. 75, 85 (1984).

This principle holds true even though a different legal theory of recovery is advanced and "even if an intervening decision effects a change in the law which bears directly on the legal theory advanced in the second suit." *Harrington* v. *Vandalia-Butler Bd. of Education*, 649 F. 2d 434, 437 (6th Cir. 1981). *See also, Harper Plastics, Inc.* v. *Amoco Chemicals Corp.*, 657 F. 2d 939, 945 (7th Cir. 1981). Indeed, the prior judgment is preclusive even if based on an erroneous view of the law. *Silcox* v. *United Service, Inc.*, 687 F. 2d 848, 852 (6th Cir. 1982).

Consolidated makes no serious attempt to refute the preclusive effect of its first lawsuit. Instead, citing its 1982 request for pole access, Consolidated argues only that its claim accrued in 1982 when Respondents denied Petitioners' request to serve all of Frankfort [Petition at 21]. This characterization of its prior claims cannot withstand scrutiny. The Second Amended Complaint in this action *concedes* that Consolidated's purported cause of action arose over thirty years ago: "*Over the past thirty years* . . . defendants have deprived and conspired to deprive plaintiff of his civil and constitutional rights by denying him access to telephone poles . . ." [emphasis added]. On its face, then, the present suit rests on the "same core of operative facts" that gave rise to the first suit thirty years ago. *Car Carriers, Inc.* v. *Ford Motor Co.*, 789 F. 2d 589, 593-96 (7th Cir. 1986).

Consolidated cannot circumvent the bar by referring to the continuing conduct exception of *Lawler v. National Screen Service Corp.*, 349 U.S. 322 (1955). The Sixth Circuit's decision is simply not inconsistent with *Lawler, Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation*, 392 U.S. 481 (1968), or *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). To fall within a con-

tinuing conspiracy exception, subsequent conduct must be more far reaching and broader than the conduct that led to the previous complaints. In *Lawler,* the conduct subsequent to the judgment resulted in a substantially changed monopoly. *Lawler, supra,* 349 U.S. at 328. Moreover, the earlier judgment had been entered after the case settled. There were no prior findings of fact or conclusions of law adjudicating the propriety of the defendant's conduct. *Id.* at 324. Respondents have defended the same actions challenged in this case in federal and state court. These courts have found no constitutional violation and no unlawful conduct.

Walsh v. International Longshoremen's Assoc'n, 630 F.2d 864, 873 (1st Cir. 1980), for example, involved a labor union's continuous refusal to refer workers to a particular ship. The plaintiff, like Consolidated, argued that the defendant's subsequet refusals were not at issue in the earlier cases. The Court rejected this contention, distinguishing *Lawler.*

> But in [Lawler], the subsequent conduct was broader and more far reaching then the conduct which led to the original complaint. Here, there is no broadening of the pattern of conduct. Rather, the conduct in each instance is the same; each ILA local simply follows the announced policy of the national union when it is asked to work on Soviet cargo. . . .

Id. at 873. Because the Court had upheld the union's policy in earlier cases involving the same parties, it refused to allow a subsequent suit arising out of the actions taken under the same policy.

B. Consolidated's Prior Federal Action Bars Its Present Constitutional Claims.

Parties are precluded from "relitigating an issue of law or fact which was necessarily decided in a previous final judgment." *City of Canton v. Maynard*, 766 F.2d 236, 238 (6th Cir. 1985), *quoting Employees Own Federal Credit Union v. City of Defiance*, 752 F.2d 243, 245 (6th Cir. 1985). The constitutional issues raised in this case were "necessarily" decided by the Sixth Circuit in *Consolidated, supra*, 465 F. 2d at 1193.

As previously explained, Consolidated's 1971 federal court complaint specifically pled that the City, the Plant Board and Community Service pursued a course of conduct since 1965 (when Consolidated's contract expired) designed to deprive Consolidated of due process and equal protection by denying its numerous "efforts to obtain a new contract with the Plant Board authorizing and permitting it to use the Plant Board's poles." Consolidated alleged that the "discrimination" has deprived it "of its constitutional right to the equal protection of the laws under the Equal Protection Clause of the Fourteenth Amendment." Thus, the issue presented to the Sixth Circuit for decision in 1972 was whether the City's operation of its CATV system deprived Consolidated of its constitutional rights. The alleged "deprivation" included the alleged discriminatory treatment of Consolidated by denying it pole access. In holding that the City's operation of its own CATV system violated no rights of Consolidated protected by the Constitution, the Sixth Circuit necessarily decided the constitutional issues presented here in Consolidated's 1971 federal court case. *Consolidated, supra*, 465 F. 2d at 1193.

The Sixth Circuit's holding that Consolidated is barred from raising its present constitutional claims rests on well-

established principles of *res judicata*. Consolidated litigated the same operative facts nearly thirty years ago. If it is allowed to continue this suit based on an identical refusal more recently affirmed, then Respondents presumably could win this seventh lawsuit and find themselves facing more requests followed by more lawsuits *ad infinitum*. This result would "eviscerate" the doctrine of *res judicata*, not the Sixth Circuit's decision as Consolidated suggests.

CONCLUSION

For the reasons stated herein, the City of Frankfort, Kentucky, and Community Service, Inc., ask this Court to deny the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Consolidated has presented no special or important reasons to justify review of the Court of Appeals' decision in this seventh action by Petitioner against Respondents. The Sixth Circuit's opinion is correct and should stand as the last chapter in too many years of litigation in federal and state courts.

Respectfully submitted,

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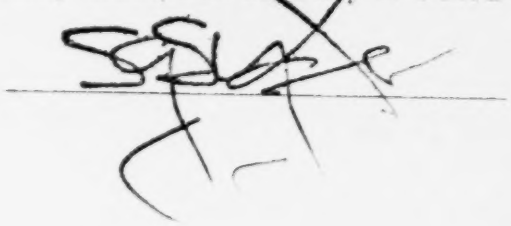
CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing have been served by mail, postage prepaid, to Joseph E. Stopher, Edward H. Stopher, and Raymond G. Smith, BOEHL, STOPHER, GRAVES & DEINDOERFER, Suite 2300, One Riverfront Plaza, Louisville, Kentucky 40202; Allen Prewitt, PREWITT & PREWITT, 311 Wilkinson Street, Frankfort, Kentucky 40601, and Charles L. Hobson, 222 West Main Street, Frankfort, Kentucky 40601, this 27th day of February, 1989.



No. 88-1278

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED TELEVISION CABLE SERVICE, INC., - - - - - Petitioner,

versus

THE CITY OF FRANKFORT, KENTUCKY, ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY and COMMUNITY SERVICE, INC., - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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No. 88-1278

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED TELEVISION CABLE SERVICE, INC. - - - - - *Petitioner*

v.

THE CITY OF FRANKFORT, KENTUCKY, ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY AND COMMUNITY SERVICE, INC. - - - *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

I. The Sixth Circuit has Dramatically Changed the Test for State Action Immunity by Allowing State Courts to Create Their Own Divergent Standards, Binding on Federal Courts, as to What Constitutes a "Clearly Articulated and Affirmatively Expressed" State Policy, and By Eliminating the Requirement That Municipalities Must Act "Pursuant To" the Declared State Policy to be Entitled to Immunity.

Respondents acknowledge that KRS 96.010 alone does not constitute a "clearly articulated and affirmatively expressed" state policy authorizing municipal

regulation or ownership of cable television.[1] *Town of Hallie* v. *City of Eau Claire,* 471 U.S. 34 (1985). They nevertheless urge this Court to deny certiorari, and by its denial affirm the Sixth Circuit's published opinion which grants state courts the same power as state legislatures to declare what municipal activities are immune from the Sherman Act. This Court has never approved such an interpretation of state action immunity. Adoption of Respondents' position would nullify the exclusive federal role in enforcing the uniform national policy of competition. Denial of this Petition will result in every municipality and municipal affiliate being automatically immune from the Sherman Act. It will permit 50 state courts to create 50 divergent state standards as to what constitutes a "clearly articulated and affirmatively expressed" state policy.

Except when a state court acts in its legislative capacity, state action immunity arises solely from the acts of a state legislature. *Hoover* v. *Ronwin,* 466 U.S. 558 (1984); *324 Liquor Corporation* v. *Duffy,* 479 U.S. 335 (1987). Contrary to respondents' brief, that principle is the heart of *Parker* v. *Brown,* 317 U.S. 341 (1943). The diffierence between the respective roles of a state legislature and a state court construing state law is fundamental to a proper application of state action immunity.

The United States is not a nation of "City-states," nor of state courts. It is a nation of states. *Com-*

[1]The named parties are the only parties to this litigation. Petitioner, Consolidated Television Cable Service, Inc., has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

munity Communications Company, Inc. v. *City of Boulder, Colorado,* 455 U.S. 40, 54 (1982). State courts do not enact laws or create a state's policy, that is solely a function of a state legislature. It is therefore only "activities directed by [a state] legislature" which the Sherman Act does not restrain. *Parker,* 351. All other conduct, whether of a municipality or a state court, is subject to the proscriptions of the Sherman Act. Indeed, this Court has repeatedly stated that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *324 Liquor Corporation,* at 343 .

By denying this Petition, the Sixth Circuit's opinion will stand for the proposition that state courts are the final arbiter of what constitutes a "clearly articulated and affirmatively expressed" state policy for antitrust purposes. Such a ruling ignores that the Sherman Act is a federal law, not a state law. It would erect an impenetrable barrier to anticompetitive municipal conduct by allowing 50 state courts to impose their own views as to whether municipal conduct should be immune under the guise of what they consider to be "clearly articulated and affirmatively expressed." The uniformity embodied in the Sherman Act would be all but destroyed. There is not a state in the nation which does not have some law which could shield every claim of illegal municipal conduct behind the cloak of a state court declaration that the challenged conduct is lawful under state law. This Court has never recog-

nized a state court interpretation of state law as being conclusive of a "clearly articulated and affirmatively expressed" state policy. *Town of Hallie,* at 448, n.8; *Community Communications Company, Inc.,* at 52, n.15.

In every state action immunity case decided by this Court, the threshold issue has been whether a state legislature has addressed the particular subject whose regulation is alleged to violate the antitrust laws. An "affirmative addressing" of the particular subject being regulated has been indispensable to a finding of state action immunity.

> *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975)—no immunity because the Supreme Court of Virginia had not approved minimum fee schedules;
>
> *Cantor* v. *Detroit Edison Company,* 428 U.S. 579 (1976)—pervasive regulation of public utilities but no specific regulation as to the distribution of light bulbs, no immunity;
>
> *Community Communications Company, Inc.*—no immunity because the Colorado legislature had never addressed the regulation of cable television;
>
> *Town of Hallie*—immunity because the Wisconsin state legislature had addressed waste treatment.

By Respondents' own admission, KRS 96.010 does not meet the standard of "clearly articulated and affirmatively expressed state policy" without resort to state court interpretation. The same, of course, can be said of numerous state statutes which exist in every

state. The fact that KRS 96.010 must be "construed" by a state court before a federal court can declare that the statute evidences a "clearly articulated and affirmatively expressed" state policy alone undermines the Sixth Circuit's application of state action immunity. State action immunity is not predicated on what a state legislature could have done, or whether certain conduct is lawful under state law, but rather on what the legislature itself "clearly articulated and affirmatively expressed." The Sixth Circuit's opinion opens a gaping "chink" in the armor of antitrust law.

Nor can Respondents' contention be accepted that municipalities may ignore a legislative state policy and still claim that they, or their municipal affiliates, acted "pursuant to " the state policy. Such a proposition nullifies the directive of this Court that cities must act "pursuant to" the legislative command in order to partake of state action immunity. *Southern Motor Carriers Rate Conference, Inc.* v. *United States,* 471 U.S. 48(1985); *City of Lafayette, Louisiana* v. *Louisiana Power & Light Company,* 435 U.S. 389 (1978).

The federal requirement that cities act "pursuant to" state policy is too important to be left to the parochial interests of state courts. Elected judges, just like elected city officials, can't help but being squeamish at the prospect of ruling that a city has exceeded its powers, particularly when such a ruling has federal antitrust ramifications. As Respondents point out, Kentucky's highest court has held that it is lawful under state law for the Plant Board to dis-

criminate against Consolidated in providing a non-traditional governmental service such as cable television. (Brief, City of Frankfort, p. 5). That is one reason why exclusive jurisdiction over antitrust claims must reside with federal courts.

Nor does this case raise the specter of federal courts being required to review every detail as to how a municipality carries out the declared state policy. There is no "subjective motivation" element to Consolidated's claim. Respondents do not deny that the City has never sought to "own" or "operate" its own cable system as required by the statute upon which they predicate their immunity. KRS 96.010. Respondents do not deny that the City has never approved the Plant Board's relationship with Community. Indeed, Community was formed not because the Plant Board found it "impracticable" to operate a cable system. Community was formed because there exists "no statutory authority for the Plant Board directly to operate a cable system." It is the City's failure to take any action remotely required by KRS 96.010 which undermines the City's entitlement to immunity.

II. The Sixth Circuit's New Test for Res Judicata Bars Recovery for a 1982 Civil Rights Violation Because It Was Not Asserted in Previous Litigation Arising Out of Conduct in 1960 and 1971.

Contrary to Respondents' brief, the Sixth Circuit did not rule that Consolidated's Civil Rights claims were barred by collateral estoppel. The Sixth Circuit affirmed the District Court's dismissal solely "on

grounds of res judicata rather than on grounds of collateral estoppel." *Consolidated Television Cable Service, Inc.* v. *City of Frankfort, Kentucky*, 857 F. 2d 354, 356 (6th Cir. 1988).

More importantly, Respondents attempt to transform the Sixth Circuit's res judicata holding into a statute of limitation defense in order to avoid the patent conflict with this Court's decisions in *Lawlor* v. *National Screen Services Corp.*, 349 U.S. 322 (1955); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation*, 392 U.S. 481 (1968); and *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971). That Respondents may have engaged in similar Civil Rights violations over a thirty year period is irrelevant. The District Court did not rule that Consolidated's claims were barred by any statute of limitation. (Appendix B, p. 29a).

Consolidated's present suit arose out of Respondents conduct in 1982, not Respondents conduct in 1960 or 1971. Those previous suits cannot bar a claim which accrued in 1982 and in which the present Civil Rights claims were never asserted. *Lawlor; Hanover Shoe, Inc.; Zenith Radio Corporation.* Any other conclusion would forever bar repeated instances of unlawful conduct which are not subject to a statute of limitation defense. There is no denying that the Sixth Circuit's opinion is directly in conflict with decisions of this Court.

CONCLUSION

The Sixth Circuit's opinion drastically alters the test repeatedly employed by this Court to determine municipal immunity from the antitrust laws. Indeed, it creates municipal immunity by state judicial fiat. In place of a uniform national standard, it creates 50 divergent state court standards as to what is or is not a "clearly articulated and affirmatively expressed" state policy. Denial of this Petition will authorize every state court to substitute its view of what the Sherman Act should prohibit in place of what the Sherman Act does prohibit.

Consolidated and Community are engaged in purely commercial activity. Community, just like Consolidated, cannot survive without being profitable. This Court should not allow the Sixth Circuit to condemn Consolidated and all others who compete with municipalities or their affiliates to extinction by placing such a gauzy cloak of state involvement over what is unregulated conduct. Petitioner respectfully requests this Court to grant its Petition and review the Opinion of the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph E. Stopher, a member of the Bar of this Court, hereby certify that on this ____ day of March, 1989, three copies of Petitioner's Reply Brief in the above-entitled case were mailed, first class postage prepaid, to Mr. Sheryl G. Snyder and Ms. Virginia Snell, WYATT, TARRANT & COMBS, 2800 Citizens Plaza, Louisville, Kentucky 40202; Mr. Allen Prewitt, PREWITT & PREWITT, 311 Wilkinson Street, Frankfort, Kentucky 40602; Mr. Charles L. Hobson, 222 West Main Street, Frankfort, Kentucky 40601; counsel for all Respondents herein. I further certify that all parties required to be served have been served.